86-344

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CASE NO.

In The Supreme Court of the United States

OCTOBER TERM, 1986

**THE STATE OF OHIO,
MARK HOLDERMAN, AND KENNETH COX,**
Appellants,

v.

FLEET AEROSPACE CORPORATION,
Appellee.

**ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a State is prohibited by the Commerce Clause or the Supremacy Clause of the Constitution of the United States from granting to the shareholders of its corporations having a substantial nexus with the State the right to vote their approval or rejection of a proposed transfer of corporate control through the acquisition of a controlling block of shares.

STATEMENT UNDER RULE 15.1(b)

Aeronca, Inc., an Ohio Corporation with its principal place of business in Ohio and its principal offices in North Carolina, was an appellant in the court below.

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THE STATE OF OHIO,
MARK HOLDERMAN, AND KENNETH COX,
Appellants,

v.

FLEET AEROSPACE CORPORATION,
Appellee.

ON APPEAL FROM
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JURISDICTIONAL STATEMENT

DECISIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (App. A, p. A-1) is reported at 796 F.2d 135. The opinion of the United States District Court for the Southern District of Ohio (App. B, p. A-10) is unreported.

JURISDICTION

The judgment below was entered on June 25, 1986. 796 F.2d 135 (App. A, p. A-1). The Court of Appeals issued its mandate on June 30, 1986. The notice of appeal (App. C, p. A-59) was filed on July 7, 1986. This appeal was docketed within 90 days after the judgment of the Court of Appeals.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(2). The validity of a State statute, on its face and as applied, has been drawn into question on the ground of being repugnant to the United States Constitution, and the decision was against the validity of the statute.[1]

In *Maine v. Taylor,* 106 S. Ct. 2440, 2446 (1986), the Court stated (footnote omitted):

> Section 1254(2) serves to ensure that a state statute is struck down by the federal judiciary only when it is found invalid by this Court, or when the parties acquiesce in the decision of a lower federal court. Federal nullification of a state statute is a grave matter whether it occurs in civil litigation or in the course of a criminal prosecution, and review by this Court is particularly warranted in either event.

See also Diamond v. Charles, 106 S. Ct. 1697, 1703 (1986) ("under 28 U.S.C. § 1254(2) . . . a State has standing to defend the constitutionality of its statute").

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, Clause 3

> [The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, ...

United States Constitution, Article VI, Clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

---

[1] The state statute in issue is Ohio's statute which applies to proposed "control share acquisitions" of corporations existing under the laws of the State of Ohio. Ohio Rev. Code § 1701.831. This statute was held to be unconstitutional under the Commerce Clause and the Supremacy Clause of the United States Constitution.

> and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are set forth in Appendix D, p. A-61; the regulations involved are set forth in Appendix E, p. A-77.

STATEMENT

This appeal is brought by the State of Ohio and two of its officers, Mark Holderman, Acting Ohio Commissioner of Securities, and Kenneth Cox, Director of the Ohio Department of Commerce (collectively, the "State of Ohio" or "Ohio"). This appeal challenges the judgment of the United States Court of Appeals for the Sixth Circuit that a law of the State of Ohio, Ohio Revised Code § 1701.831, is unconstitutional under the Commerce Clause and the Supremacy Clause of the United States Constitution. The courts below held that Ohio Revised Code § 1701.831 is not a legitimate exercise of Ohio's powers to regulate proposed "control share acquisitions" of Ohio corporations within the "room for state regulation of tender offers" left after this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982) ("*MITE*") (Powell, J., concurring in part).[2]

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[2] Appeals by the State of Indiana and CTS Corporation respecting a similar statute which was struck down by the United States Court of Appeals for the Seventh Circuit were docketed on July 21 and 22, 1986. *CTS Corp. v. Dynamics Corp.*, 55 U.S.L.W. 3092 (July 21, 1986) (No. 86-71); *Indiana v. Dynamics Corp.*, 55 U.S.L.W. 3093 (U.S. July 22, 1986) (No. 86-97). As shown below, the Indiana statute differs in several important respects from Ohio Revised Code § 1701.831, in that the Indiana enactment permitted a target board to "opt in" to the act before its effective date; authorized the target to redeem the bidder's shares if it violated the act; required the bidder to pay the costs of the target's special meeting of shareholders; and failed to regulate the transfer of shares from one majority holder to another. Nonetheless, in considering the two cases, the Court has the opportunity to define more clearly the extent of state power in this area, and to clear up the confusion resulting from *MITE* and its misapplication in the lower courts.

The statute which the Court of Appeals invalidated is a "second generation" statute enacted by unanimous vote of the Ohio General Assembly following this Court's decision in *MITE*, which held an earlier, far broader, Illinois statute to be invalid under the Commerce Clause. The purpose of the Ohio statute was to create a process through which shareholders of Ohio corporations could decide upon proposed transfers of corporate control within the constitutional limitations imposed by *MITE*.[3]

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[3] In its codified findings accompanying Ohio Revised Code § 1701.831, the Ohio General Assembly found as fact that (Ohio Rev. Code § 1701.832(A)(1), (2)):

> Numerous Ohio corporations have been the subject of tender offers and accumulations of significant blocks of securities . . . . [without] the normal corporate approval mechanisms involved in other typical types of acquisition transactions such as mergers, consolidations, combinations and majority share acquisitions.

The General Assembly concluded that the traditional means of resolving changes in corporate control — namely, shareholder voting pursuant to Ohio statutes governing such changes — should be applied to more recently-developed types of transactions, such as tender offers.

The Ohio statute was enacted specifically to comply with federal court decisions which had struck down several States' "first generation" statutes. Ohio Revised Code § 1701.832(A)(5), (B) states:

> Initial state efforts to deal with tender offer developments have been questioned by the federal courts. The General Assembly observes that responsib[i]lity for general corporate laws is the function of state legislation and that no federal law of corporations exists. The General Assembly observes that securities law protection of state residents has long been recognized as an appropriate subject of state law regulation under the federal system. The General Assembly acknowledges an in loco parentis responsibility to shareholders who invest in corporations created under the laws of Ohio and to shareholders generally who reside in Ohio.
>
> * * *
>
> [W]ith a view to avoiding an undue burden on interstate commerce, as expressed in recent court decisions, the amendments are designed to have the minimum impact upon such commerce consistent with Ohio responsibility in respect to the subject matter.
> * * *

The statute establishes for shareholders of "issuing public corporations" the right to vote on proposed "control share acquisitions."[4] An "issuing public corporation" is defined to mean an *Ohio* corporation having 50 or more shareholders and its principal place of business, principal executive offices, or substantial assets in Ohio. Ohio Rev. Code § 1701.01(Y). The statute does not apply to foreign corporations. The Ohio corporation's articles or regulations may provide otherwise, but if they do not, a control share acquisition may take place only with the prior authorization of the corporation's shareholders.

The "acquiring person" (or "bidder") must first deliver an "acquiring person statement" to the corporation whose shares are sought (the "target").[5] Within ten days after receipt of the acquiring person statement, the directors of the subject company (or target) must call a special shareholders' meeting to vote on the proposed control share acquisition. The target must distribute to all of its shareholders both the acquiring person statement and a statement of management's position (or lack of position) on the transaction.

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[4] A "control share acquisition" is defined to mean the direct or indirect acquisition of shares that, when added to the shares already held by the acquiring person, would entitle it to exercise either directly or indirectly voting power respecting the election of directors, within three different voting classes:(a) one-fifth or more but less than one-third of such voting power; (b) one-third or more but less than a majority of such voting power; (c) a majority or more of such voting power. Ohio Rev. Code § 1701.01(Z)(1). The statute applies regardless of whether the proposed acquisition is to be made by tender offer, market purchases, or private purchases. The statute does not apply unless an acquisition would result in an acquiring person having twenty percent or more of the voting power of the corporation, a percentage of ownership which "frequently is regarded as control of a corporation." *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1225 (4th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981).

[5] The information required in the acquiring person statement is similar to, but does not exceed, the disclosures required of a bidder in a tender offer by the Securities and Exchange Commission's ("SEC") Schedule l4D-1, 17 C.F.R. § 240.l4d-100, promulgated under the Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f). The bidder must also represent in the statement that its proposed control share acquisition will be lawful and that it has the financial capacity to make the acquisition. Ohio Rev. Code § 1701.831(A), (B).

Unless the bidder agrees to another date, the special shareholders' meeting must be held within 50 days after the target corporation's receipt of the acquiring person statement. The bidder has the right, to afford itself adequate time to communicate with target shareholders, to demand that the meeting not be held sooner than 30 days after delivery of the statement. In addition, Ohio Revised Code § 1701.831(C) provides that the shareholders' meeting "shall not be held later than any other special meeting of shareholders that is called, after receipt . . . of the acquiring person statement . . . ."[6]

On May 21, 1986, appellee Fleet Aerospace Corporation ("Fleet") commenced a tender offer for all shares of Aeronca, Inc. ("Aeronca").[7] Aeronca is an Ohio corporation with its principal place of business in the State of Ohio and its principal offices in North Carolina. The price offered was $5.00 per share. At the same time, Fleet filed this action in the District Court for the Southern District of Ohio against Aeronca, Acting Commissioner Holderman and Director Cox, seeking a declaration that Ohio Revised Code § 1701.831 is unconstitutional.[8] Upon application by Fleet, the District Court granted a temporary restraining order against the enforcement of the Ohio statute as to Fleet's tender offer for shares of Aeronca.

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[6] A quorum for the special shareholders' meeting consists of both a majority of the voting power in the election of directors, and a majority of such voting power excluding "interested shares." The term "interested shares" is defined as shares held by the bidder and the officers and inside directors of the target. Ohio Rev. Code § 1701.01(CC). The proposed acquisition may go forward if it is authorized by the affirmative votes of both a majority of the voting power represented at the special shareholders' meeting, and a majority of such voting power excluding interested shares. Ohio Rev. Code § 1701.831(E)(1).

[7] At the time, there were approximately three million outstanding common shares of Aeronca held by about 2,780 shareholders of record. Fleet's tender offer was subject to a number of contractual conditions precedent, including the obtaining of a final judgment that Ohio Revised Code § 1701.831 is unconstitutional.

[8] Fleet also sought to have the District Court hold unconstitutional Ohio Revised Code §§ 1707.041, 1707.042, 1707.23, and 1707.26. This portion of the Complaint was dismissed by the District Court as moot, and is not a subject of this appeal.

The State moved in the District Court for leave to intervene pursuant to 28 U.S.C. § 2403(b) and Rule 24(a)(1), Fed. R. Civ. P. Intervention was subsequently allowed. The State of Ohio filed an Answer and Counterclaim seeking both rescission of any shares purchased by Fleet and enforcement of Ohio Revised Code § 1701.831.[9]

On June 2 and 3, 1986, the District Court held a hearing on Fleet's and Aeronca's cross-motions for a preliminary injunction. Testimony was presented by the State of Ohio, and oral argument was made by all parties. Affidavits were submitted by the parties for the court's consideration, including the affidavit of former SEC Chairman Harold M. Williams on behalf of Ohio.

The District Court issued its decision (App. B, p. A-10) on June 11, 1986. It found Ohio Rev. Code § 1701.831 unconstitutional on its face and as applied to Fleet's tender offer for Aeronca's shares under the Supremacy Clause and the Commerce Clause of the United States Constitution.

Respecting the Supremacy Clause issue, the District Court acknowledged that "Congress has not explicitly prohibited states from regulating takeovers," but concluded that the Ohio statute "frustrates the objectives of the Williams Act in a substantial manner."[10] (App. B, p. A-23-25). The court

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[9] Ohio has a sovereign interest "to create and enforce a legal code, both civil and criminal," and a "quasi-sovereign interest in the health and well being — both physical and economic — of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601, 607 (1982). In particular, Ohio invokes its specific statutory powers set forth in the Ohio Revised Code to challenge Fleet's attack on one of its laws. *See* Ohio Rev. Code §§ 1707.99 (securitieslaw; criminal penalties), 2733.02 (quo warranto civil action against corporations).

[10] The Williams Act amendments to the Securities Exchange Act of 1934, and SEC regulations promulgated thereunder, relate to the tender offer here in three primary respects. First, upon commencement of the tender offer, the offeror is required to file with the SEC, publish or send to target shareholders and to the target detailed information about the offer. Second, shareholders who tender their shares may withdraw them during the first fifteen business days of the tender offer, and, if the bidder has not purchased their shares, at any time after 60 calendar days from the offer's commencement. Third, all shares tendered must be purchased at the same price; if the price is increased during the tender offer, shareholders who had tendered prior to the increase must receive the benefit of the increase. 15 U.S.C. §§ 78m(d)(1), 78n(d)(1), (d)(5), (d)(7); 17 C.F.R. §§ 240.13d-1, 240.14d-7(a)(1), 240.24d-3. *See MITE, supra*, 457 U.S. at 632.

identified three ways in which, it said, the federal and state regulatory schemes conflicted impermissibly.

First, the court held that, under the Williams Act and related regulations, Fleet had a right under federal law to purchase tendered shares fifteen days after the commencement of its tender offer. Under the Ohio statute, the shareholders' vote on the tender offer would have taken place, at the latest, on July 10, 1986. The delay between when the court believed Fleet had a right to begin to purchase Aeronca shares, June 12, 1986, and July 10, 1986, was deemed constitutionally inconsistent with the Williams Act and regulations because it gave a supposed advantage to incumbent management (App. B, pp. A-26-28). There was no evidence in the record to support the District Court's assumption, and, as discussed below, the developments subsequent to the decision demonstrate that that assumption was unwarranted.

Second, the District Court found that the shareholder vote procedure of the Ohio statute (App. B, p. A-28) (footnote omitted)

> not only raises the possibility of an offeror being unable to complete the Ohio process prior to the 60 day withdrawal period, but may discourage offerors from pursuing tender offers and/or, at the least, impose upon the offeror an additional costly and time consuming-burden in connection with cash tender offers.

The District Court's conclusion was contrary to the record evidence, which established that the procedural requirements of the Ohio statute can be (and the statute itself requires that they must be) completed within 60 days. The court concluded that the Ohio statute impermissibly "tips the scales in favor of incumbent management." (App. B, p. A-29). Again, its conclusions were contrary to the evidence of record.

Third, the District Court found the Ohio shareholder vote procedure inconsistent with the Williams Act because it

prevented a shareholder from making "his or her own independent decision in a neutral atmosphere." (App. B, p. A-29). The uncontradicted evidence introduced by the State at the hearing, however, established that the Ohio statute allows shareholders to make informed decisions free of the coercive economic and time pressures inherent in tender offers.

The District Court also concluded that Ohio Revised Code § 1701.831 constituted both an impermissible direct and indirect burden on interstate commerce. The court held that the statute was a direct burden on commerce because out-of-state Aeronca shareholders were subject to its provisions, and, as such, it had an impermissible extraterritorial effect (App. B, pp. A-31-35). The court did not explain, however, why there has never been any question as to the constitutional validity of similar voting requirements for other transactions, such as mergers and consolidations, which have historically been imposed upon out-of-state shareholders by the State under whose laws their corporation is created.

The District Court referred to the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in finding the Ohio statute to be an impermissible indirect burden on commerce. The court concluded that the Ohio statute was not a legitimate exercise of the State's power to establish rules of corporate governance for its corporations, because Ohio had no interest in governing the relations of nonresident shareholders with its corporations (App. B, pp. A-35-40).

The District Court granted Fleet's motion for a preliminary injunction, and denied Aeronca's cross-motion for a preliminary injunction. The State of Ohio and Aeronca were enjoined from taking any action to invoke, enforce or apply the provisions of the Ohio statute against Fleet in connection with its tender offer for Aeronca shares (App. B, p. A-42). The State of Ohio and Aeronca appealed to the United States Court of Appeals for the Sixth Circuit.

After an appeal was taken but prior to oral argument before the Court of Appeals, Aeronca and Fleet entered into a merger agreement which increased the offering price per share from $5.00 to $6.00. Despite its earlier protestations about the untoward effects of delay, in the merger agreement Fleet unilaterally extended its tender offer until June 30, 1986.[11] Fleet and Aeronca agreed to a lock-up stock option agreement by which Fleet had the right to purchase 400,000 shares of Aeronca treasury stock and the right to a determinable cash payment from Aeronca under certain circumstances. Aeronca's president also was provided an employment agreement under which he would receive $2.325 million over five years.

The Court of Appeals held the Ohio statute unconstitutional under the Supremacy Clause and Commerce Clause and affirmed the decision of the District Court.[12]

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[11] The offer was later extended by Fleet several times. The latest date upon which Fleet agreed to receive tendered Aeronca shares was September 5, 1986 — almost three months beyond the withdrawal date and almost two months after the date on which the shareholders' meeting would have occurred under Ohio law.

[12] The Court of Appeals' analysis of the issues was limited. Regarding the preemption issue, the court held: "We agree substantially for the reasons expressed by Judge Holschuh." With respect to the Commerce Clause, it stated: "We agree also that the Ohio law in question offends the Commerce Clause for essentially the reasons stated by the district court." 796 F.2d at 139 (App. A, p. A-6).

GROUNDS FOR PLENARY CONSIDERATION

The question presented is substantial.

I. THIS COURT HAS UPHELD THE RIGHT OF A STATE TO LEGISLATE RULES OF CORPORATE GOVERNANCE FOR ITS CORPORATIONS EVEN THOUGH SUCH REGULATION NECESSARILY BURDENS INTERSTATE COMMERCE. ALLOWING SHAREHOLDERS TO VOTE ON A PROPOSED CONTROL SHARE ACQUISITION IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF OHIO'S POWERS UNDER THE COMMERCE CLAUSE.

The courts below determined incorrectly that this Court's decision in *MITE* requires that the Ohio statute be found invalid under the Commerce Clause. Traditional constitutional law principles further support the validity of that statute as a permissible exercise of the State's power to govern the corporations it creates.

In *MITE*, a majority of this Court decided that the challenged Illinois statute constituted an indirect burden on interstate commerce which was excessive in relation to the asserted local interests which it served under the *Pike* balancing test. *MITE, supra*, 457 U.S. at 643-46.[13] There were a number of opinions, but, except for the Statement of Facts and the holding that the case was not moot, only Part V-B of the opinion attracted the vote of five Justices. 457 U.S. at 643-46.

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[13] As stated by the lower court in *MITE*, there was no record evidence on the actual effect of the Illinois statute. *MITE Corp. v. Dixon*, 633 F.2d 486, 497-98 (7th Cir. 1980). Here, the factual assertions made in the majority opinion in *MITE* were addressed by the testimony of James M. Tobin, Esq., whom the District Court and counsel for Fleet acknowledged to be an expert in tender offers, and by the affidavit of Harold M. Williams, a former Chairman of the SEC. The Court will have in this case a record basis for the factual issues which relate to the legal questions presented. *See Maine v. Taylor*, 106 S. Ct. 2440, 2449-51 (1986) (detailed analysis of evidence before the district court in rejecting a Commerce Clause challenge to a Maine statute prohibiting the importation of live baitfish into the State). Unlike the situation in *MITE*, there is record evidence to support the State's arguments here.

Of the five votes in *MITE*, those of Justices Powell and Stevens were made with explicit reservations respecting limitations on the power of States to regulate tender offers. Justice Powell wrote (457 U.S. at 646-47):

> I join part V-B because its Commerce Clause reasoning leaves some room for state regulation of tender offers.
>
> * * *
>
> I agree with Justice Stevens that the Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure — at least in some circumstances — greater protection to interests that include but often are broader than those of incumbent management.

Justice Stevens concurred in Part V of Justice White's opinion, but added (457 U.S. at 655):

> I am not persuaded, however, that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management. Accordingly, although I agree with the Court's assessment of the impact of the Illinois statute, I do not join in its pre-emption holding.

The Illinois statute in *MITE* is far different from the Ohio statute in this appeal. The Illinois statute regulated tender offers for the shares of "target corporations," defined as any corporation — whether incorporated in Illinois or not — of which more than 10% of the shares were held by Illinois residents, or which had either its principal executive office in Illinois or 10% of its stated capital and paid-in surplus represented within Illinois. *MITE, supra*, 457 U.S. at 627. The statute required any bidder making a tender offer for a "target

corporation" to file its offer with the Illinois Secretary of State twenty days in advance of public announcement of the offer. Further, it empowered the Secretary to hold a hearing to adjudicate the substantive fairness of the tender offer and to delay the offer indefinitely if he determined it to be unfair. *MITE, supra,* 457 U.S. at 627.[14]

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[14] The Court made three assumptions of fact in deciding that the effect of the Illinois statute was an impermissible indirect burden on commerce (457 U.S. at 643):

> Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.

In reaching these conclusions, the Court had no evidence of record and necessarily relied on three secondary sources. The first two sources were law review articles which advanced only one side of the ongoing economic debate respecting the economic effects of tender offers and takeovers in general on the Nation's economy. *See Dynamics Corp. v. CTS Corp.,* 794 F.2d 250, 253 (7th Cir.), *appeal docketed,* 55 U.S.L.W. 3092 (July 21, 1986) (No. 86-71), *and appeal docketed sub nom. Indiana v. Dynamics Corp.,* 55 U.S.L.W. 3093 (U.S. July 22, 1986) (No. 86-97). The Court acknowledged in *MITE* the efficient market hypothesis, which assumes that acquired company management is inefficient and that this inefficiency is reflected in a depressed market value of the shares of the company.

The efficient market hypothesis, however, was found to be lacking in empirical support in several recent articles on the subject. *See, e.g.,* Coffee, *Regulating the Market for Corporate Control:A Critical Assessment of the Tender Offer's Role in Corporate Governance,* 84 Colum. L. Rev. 1145 (1984); Hamilton, *Private Sale of Control Transactions:Where We Stand Today,* 36 Case W. Res. L. Rev. 248, 252-56 (1985); Johnson, *Minnesota's Control Share Acquisition Statute and the Need for New Judicial Analysis of State Takeover Legislation,* 12 Wm. Mitchell L. Rev. 183 (1986); Summers, *Does The Stock Market Rationally Reflect Fundamental Values?,* 41 J. Fin. Econ. 591 (July 1986). Other recent articles conclude, among other things, that the market is an inefficient indicator of the value of a publicly-traded company, because of the substantial number of institutional investors which traditionally have short-term expectations and goals regarding the securities in which they deal. *E.g.,* Buxbaum, *Corporate Legitimacy, Economic Theory, and Legal Doctrine,* 45 Ohio St. L.J. 515 (1984); Law, *A Corporation is More Than Its Stock,* Harv. Bus. Rev. 80 (May-June 1986); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation,* 83 Colum. L. Rev. 249 (1983). *See also* Fogg, *Takeovers: Last Chance for Self-Restraint,* Harv. Bus. Rev. 30 (Nov. - Dec. 1985); Herzel, Schmidt and Davis, *Why Corporate Directors Have a Right to Resist Tender Offers,* 3 Corp. L. Rev. 107 (1980); Mueller, *Mergers and Market Share,* 67 Rev. Econ. Stat. 259 (1985); Scherer, *Takeovers: Present and Future Dangers,* The Brookings Rev. 15 (Winter/Spring 1986).

In contrast to the Illinois act, the Ohio statute does not provide for precommencement delay or for a State official to conduct a hearing at the target's request on the fairness of the offer.[15] The Ohio statute does not apply to foreign corporations, but only to Ohio corporations having a substantial nexus with the State. Only the Ohio target corporation's shareholders, acting pursuant to statutory procedures, can determine whether a proposed control share acquisition should be accepted.

Footnote 14 continued:

The third secondary source upon which the Court relied is a statement by Hon. Peter J. Rodino in a ten-year-old Report of the House Committee on the Judiciary, which dealt with the 1976 Hart-Scott-Rodino amendments to the Clayton Act. H.R. Rep. No. 94-1373, p. 12, *cited in MITE, supra*, 457 U.S. at 644. Chairman Rodino, however, has greatly modified his views since the 1976 Report. In introducing an amendment to the Clayton Act which would extend the Hart-Scott-Rodino waiting periods for certain large transactions, he stated recently (131 Cong. Rec. E434 (Feb. 7, 1985)):

> The bill would end the unwarranted favored status of cash tender offers under section 7A of the Clayton Act. . . . A major concern with some cash tender offers has been the inadequate time available to respond to offers that will affect the lives and fortunes of thousands of employees and, in some cases, entire communities. . . . No system of corporate control serves this Nation well if the managers of our largest industrial enterprises are so consumed with the gamesmanship of takeover tactics that they are unable to manage a corporation's productive capacities. Consumers, employees, and stockholders are all best served if the management is able to focus on its primary task: Maximizing a firm's economic potential through innovation and investment in areas in which the firm has expertise . . . .

Thus, the continuing validity of the three secondary sources cited by the Court in *MITE* is questionable and deserving of reexamination. This is especially true in the present case where the uncontradicted evidence of record rebuts the conclusions reached in each of the sources.

[15] This is an important difference between the Ohio statute and the Illinois statute invalidated in *MITE*. As the Court recently stated, "[t]he protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 106 S. Ct. 2080, 2086 (1986).

As the codified findings of the Ohio General Assembly confirm, the voting rights conferred on shareholders of Ohio corporations by Ohio Revised Code § 1701.831 are analogous in all respects to those which have traditionally been exercised in other fundamental corporate transactions such as mergers and consolidations. Ohio Rev. Code § 1701.832(A)(1), (2). See Ohio Rev. Code §§ 1701.78-.83 (mergers and consolidations). The requirement of shareholder approval of a proposed merger has never been thought to offend the Commerce Clause, even though the vote may introduce delay and shareholder disapproval may prevent a transaction that would otherwise occur in interstate commerce. The effects of the Ohio statute are no different.

Congress has declined to legislate a federal corporation law applicable to all fundamental corporate changes. In the absence of any action by Congress, the control over all aspects of corporate organization and governance is left to the States, and, specifically, to the State of incorporation. *See Cort v. Ash,* 422 U.S. 66, 84-85 (1975), *quoted in Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 479 (1977), where this Court has held:[16]

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where

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[16] *See also First National City Bank v. Banco para El Comercio Exterior de Cuba,* 462 U.S. 611, 621 (1983) ("As a general matter, the law of the State of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation.") (emphasis in original); *Ashley v. Ryan,* 153 U.S. 436, 440-42 (1894); *Bank of Augusta v. Earle,* 38 U.S. (13 Pet.) 519, 587-89 (1839); *Korn & Wisemiller v. The Mut. Ass. Soc.,* 10 U.S. (6 Cranch) 192, 199-200 (1810); *Head & Amory v. Providence Ins. Co.,* 6 U.S. (2 Cranch) 127, 167 (1804). As the Court stated in *Rogers v. Guaranty Trust Co.,* 288 U.S. 123, 130 (1933) (emphasis added):

> When, by acquisition of his stock, plaintiff became a member of the corporation, *he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the State in which it was organized.* His rights, whatever the tribunal chosen for their vindication, are to be determined upon the ascertainment and proper application of New Jersey law.

> federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.

A State has a unique and therefore compelling interest in the internal governance of the corporations which it creates. The law of the State of incorporation has been applied to a variety of "internal affairs" transactions which necessarily affect the rights and obligations of the corporation and those of its shareholders, wherever they may be. Examples include the validity of restrictions on shareholders' ability to transfer their shares,[17] enforceability of shareholders' agreements concerning their relationships and the affairs of their corporations,[18] procedures for effecting a merger and the rights of shareholders to a "fair price" in and to dissent from a merger,[19] the validity and enforceability of assessments against shareholders of an insolvent corporation regardless of their residence,[20] and the fiduciary duties owed by directors and majority shareholders to other shareholders.[21] As this Court stated in *Modern Woodmen v. Mixer*, 267 U.S. 544, 551 (1925):

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[17] *E.g., St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F.2d 1040 (8th Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) (restrictions on transfer of stock in Delaware corporation enforced under Delaware law as against Missouri stockholder); *B&H Warehouse, Inc. v. Atlas Van Lines, Inc.*, 490 F.2d 818, 821 (5th Cir. 1974).

[18] *E.g., Glazer v. Glazer*, 374 F.2d 390, 407-11 (5th Cir.), *cert. denied*, 389 U.S. 831 (1967) (a single agreement among shareholders applicable to 21 corporations created under the laws of four States held valid and enforceable as to corporations created under the laws of three of the States, but invalid and unenforceable under the laws of the fourth State); *Zion v. Kurtz*, 50 N.Y.2d 92, 428 N.Y.S.2d 199, 405 N.E.2d 681 (1980); *Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 49 A.2d 603 (Del. Ch. 1946), *modified*, 53 A.2d 441 (Del. 1947).

[19] *E.g., Mullen v. Academy Life Ins. Co.*, 705 F.2d 971, 973 n.3 (8th Cir.) (per curiam), *cert. denied*, 464 U.S. 827 (1983) (applying the law of the State of incorporation (New Jersey) to the issue of whether an appraisal proceeding is the only means by which a dissenting shareholder can challenge the price paid in a merger).

[20] *E.g., Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 207 (1941) ("It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the state of its organization, although they are not made parties to the proceeding for levying it."); *Broderick v. Rosner*, 294 U.S. 629, 643-44 (1935); *Converse v. Hamilton*, 224 U.S. 243, 260-61 (1912).

[21] *E.g., Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478-79 (1977); *Radol v. Thomas*, 772 F.2d 244, 256 (6th Cir.), *cert. denied*, 106 S. Ct. 3272 (1986).

> The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation.

That state laws governing the internal affairs of corporations are constitutionally permissible, even when they burden interstate commerce, is confirmed by the development of exotic defensive tactics in takeovers. Such tactics, although having a much greater impact upon commerce than the Ohio statute's provision for a shareholder vote,[22] have been upheld against constitutional challenge.[23] The Delaware Supreme Court recently upheld a Delaware statute, which permitted the adoption of a preferred share purchase rights plan, against an attack on both Supremacy Clause and Commerce Clause grounds. *Moran v. Household International, Inc.*, 500 A.2d 1346, 1353 (Del. 1985).

In rejecting Ohio's interest in the internal affairs or governance of corporations created under its laws, the courts below relied on a statement in *MITE* which referred to the internal affairs doctrine as a "conflict of laws principle." 457 U.S. at 645. This statement was made in the context of an Illinois statute that did not purport to relate to corporate internal affairs and was not confined to Illinois corporations. Illinois could not use its powers over internal corporate

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[22] *See* SEC Rel. No. 34-23486, [Current Service] Fed. Sec. L. Rep. ¶ 84,018, at p. 88,204 (July 31, 1986) ("[P]oison pills may harm shareholders by restricting their opportunity to consider hostile tender offers and by limiting their ability to wage proxy contests.") (footnote omitted).

[23] Defensive tactics employed by incumbent management, such as poison pills, can altogether preclude a takeover. *See Dynamics Corp. v. CTS Corp.*, [Current Service] Fed. Sec. L. Rep. (CCH) ¶ 92,743 (N.D. Ill.), *aff'd*, 794 F.2d 250 (7th Cir.), *appeal docketed*, 55 U.S.L.W. 3092 (U.S. July 21, 1986) (No. 86-71), *and appeal docketed sub nom. Indiana v. Dynamics Corp.*, 55 U.S.L.W. 3093 (U.S. July 22, 1986) (No. 86-97); *Moran v. Household Int'l*, 500 A.2d 1346, 1353 (Del. 1985). In contrast, the Ohio statute enables shareholders to decide collectively whether to permit a proposed control share acquisition, and does not involve unilateral decisionmaking as to the propriety of a proposed transaction by incumbent management or the State.

governance to justify its regulation of tender offers for foreign corporations. This statement merits reexamination by the Court in the context of the Ohio statute, which does prescribe procedures for the conduct of the internal affairs of Ohio corporations. *See Ashley v. Ryan, supra,* 153 U.S. at 446:

> The question here is not the power of the State of Ohio to lay a charge on interstate commerce, . . . but simply [its] right to determine upon what conditions its laws as to the consolidation of corporations may be availed of.

The right of a State to legislate rules of corporate governance cannot properly be dismissed as a conflict of laws rule. It is a long-established constitutional principle of Federal-State relations. It is very likely that Congress has the power to enact a general corporation law, applicable to most business corporations, and, indeed, eliminating State corporation laws under its commerce power. But Congress has deliberately chosen not to do so. From the beginning, the clearly established constitutional convention has been that, in the allocation of Federal-State power, authority with respect to internal affairs and governance of State-created corporations is allocated to the State of incorporation.[24] That is not a mere "conflict of laws" rule. Because the Court of Appeals' decision is based upon an unjustifiably expanded reading of *MITE,* which improperly limits the scope of State power under its general corporation law, plenary review is warranted.

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[24] Federal courts have traditionally deferred to the States in other areas of jurisprudence, such as many issues involved with domestic relations and probate matters. *See In re Burrus,* 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."); *Waterman v. Canal-Louisiana Bk. and Tr. Co.,* 215 U.S. 33, 45 (1909) (Court declined to exercise jurisdiction over claim for an accounting of an estate).

II. THIS COURT HAS DETERMINED THAT THE SOLE PURPOSE OF THE WILLIAMS ACT IS THE PROTECTION OF INVESTORS. THE OHIO STATUTE DOES NOT CONFLICT WITH THE PURPOSE OR REQUIREMENTS OF THE WILLIAMS ACT.

The *MITE* case held only that the Illinois statute violated the Commerce Clause. It did not hold that the Illinois statute violated the Supremacy Clause because of conflict with the federal Williams Act.

Despite the fact that the Ohio General Assembly drafted Ohio Revised Code § 1701.831 to be far more narrow in effect than the Illinois statute in *MITE,* the courts below purported to rely upon *MITE* in holding that the Ohio statute conflicted with the Williams Act. In particular, they found a supposed conflict between Ohio Revised Code § 1701.831 and what they perceived to be the purpose of Congress, in enacting the Williams Act, to preserve neutrality between a bidder and a target's management.

As the Court of Appeals recognized, however, Congress has not explicitly prohibited the States from regulating take-over transactions (App. A, p. A-6). *See Leroy v. Great Western United Corp.,* 443 U.S. 173, 182 (1979). To the contrary, Congress has specifically and expressly disclaimed an intention to occupy the field of regulation of tender offers. Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), which was not amended by the Williams Act, provides that (emphasis added):

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person *insofar is it does not conflict with the provisions of this chapter or the rules and regulations thereunder.*

There is no conflict between the provisions of the Williams Act and Ohio's procedure for a shareholder vote on proposed transfers of corporate control. In the face of Congress' unambiguous reservation of State power,[25] however, the courts below improperly continued their inquiry and manufactured a supposed conflict between the intent of Congress in enacting the Williams Act and the Ohio shareholder vote procedure. There being no conflict, the inquiry should be at an end.[26]

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[25] *See Garcia v. United States*, 105 S. Ct. 479, 483 (1984) (citations omitted) (emphasis added):

> Notwithstanding petitioners' argument to the contrary, we are satisfied that the statutory language with which we deal has a plain and unambiguous meaning. While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from that data would justify a limitation on the "plain meaning" of the statutory language. *When we find the terms of a statute unambiguous, judicial inquiry is complete, except in " 'rare and exceptional circumstances' ".*

[26] Even were the analysis of the intent of Congress appropriate, the courts below ignored this Court's holdings that the sole purpose of the Williams Act is investor protection. Because the Ohio statute furthers, rather than hinders, that goal, it does not "frustrate[] any part or purpose of the federal legislation." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 139 (1973) (citations omitted).

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), the Court held that a tender offeror does not have standing to sue for damages under § 14(e) of the Securities Exchange Act of 1934. This provision had been added to the Securities Exchange Act by § 3 of the Williams Act, 82 Stat. 457, 15 U.S.C. § 78n(e). The Court examined in detail the legislative history of the Williams Act and concluded (430 U.S. at 35) (emphasis added):

> *The legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer.* As we stated in *Rondeau v. Mosinee Paper Corp.*, 422 U.S., at 58: "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information."

This Court rejected the assertion that the regulation of tender offers which Congress provided supported the argument that a federal cause of action should be implied under § 14(e) (430 U.S. at 29) (emphasis added):

> *Congress* was indeed committed to a policy of neutrality in contests for control, but its *policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute.* Neutrality is, rather, but one characteristic of legislation directed toward a different purpose — the protection of investors.

The courts below implicitly held that the Williams Act creates a right on behalf of a bidder to complete a tender offer. The Williams Act creates no such right, nor does it impose an obligation to purchase tendered shares. *See AMCA International Corp. v. Krouse,* 482 F. Supp. 929, 937 (S.D. Ohio 1979). SEC Rule 14(e)-1(a), 17 C.F.R. § 240.l4e-1, specifies a minimum period of twenty business days during which a bidder must hold open its offer, but it does not confer any right or impose any obligation to purchase tendered shares.[27]

The Williams Act and SEC Rules relating to withdrawal rights permit a bidder to hold tendered shares in the period from fifteen business days until 60 calendar days after commencement of an offer. 15 U.S.C. § 78n(d)(5); 17 C.F.R. § 240.l4d-7. These provisions, however, do not confer any right or impose any obligation upon bidders to purchase tendered shares.

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[27] 17 C.F.R. § 240.14e-1(a) states (emphasis added):

> As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, no person who makes a tender offer shall:
>
> > (a) *Hold such tender offer open for less than twenty business days from the date such tender offer is first published or sent or given to security holders:* . . .

See SEC Rel. 34-23486, [Current Service] Fed. Sec. L. Rep. (CCH) ¶ 84,018, at p. 88,201 (July 31, 1986) ("The Williams Act and tender offer rules are designed to provide shareholders with sufficient time and information to make an informed decision whether to sell into the market, tender, or hold the securities. They also establish substantive protections, including a *minimum offering period,* and withdrawal and proration rights.") (emphasis added).

Not only does this provision not grant Fleet the right to purchase tendered shares after twenty business days from the commencement of its tender offer, there is a substantial question whether its terms can be utilized to strike down Ohio's statute in the first instance. This Court held in *Schreiber v. Burlington Northern, Inc.,* 105 S. Ct. 2458, 2465 (1985), that "[w]ithout misrepresentation or nondisclosure, § 14(e) has not been violated." The Ohio statute is not directed toward misrepresentation or nondisclosure; it merely provides a mechanism for collective shareholder approval of a proposed change in corporate control. The SEC Rule which implements Congress' enactment of § 14(e) should therefore not be construed to manufacture a conflict with a State law that does not apply to misrepresentation or nondisclosure.

The Ohio statute does not require delay in any step in the offer process established by the Williams Act and the SEC Rules. The offer can commence at the offeror's discretion and can proceed in accordance with applicable substantive and procedural provisions of the Williams Act. The bidder can take up and hold all tendered shares. The Ohio statute prohibits only the bidder's purchase of those shares until the shareholders have voted their approval, and the vote must occur before the tendered shares can be withdrawn from the bidder's custody under the SEC Rules.[28]

Much like other post-offer contractual conditions which accompany many tender offers,[29] including the one in this case, the Ohio statute requires merely that consummation of the offer be conditioned upon the approval of the target shareholders. Such a condition and the delay which it may entail (within the time limit established by the Williams Act) is indistinguishable from the delay that results from other federal or state regulation of tender offers.[30]

The SEC Rule permitting withdrawal of tendered shares 60 days after an offer begins demonstrates that the SEC contemplated that some offers would not be completed within that period. In addition, many tender offers are delayed by a variety of factors unrelated to federal regulation, such as

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[28] The Ohio statute provides for a shareholder meeting to be held within a definite time period that is limited to the amount of time needed to prepare and deliver proxy materials, and to allow shareholders to decide and return their proxies. Unlike the Illinois statute before the Court in *MITE*, in the Ohio statute there is no pre-commencement notice to the target, no administrative hearings on the fairness of the offer, and no requirement of burdensome disclosure beyond what is required by the Williams Act.

[29] *See, e.g.*, SEC Rel. 34-16623, 3 Fed. Sec. L. Rep. (CCH) ¶ 24,284I (March 5, 1980) (permitting the purchase obligation to be conditioned upon post-offer event).

[30] *E.g.*, Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18(a); Bank Holding Company Act, 49 U.S.C. § 1378; Federal Communications Act, 47 U.S.C. § 310; Interstate Commerce Act, 49 U.S.C. § 11343. *See also* SEC Rel. No. 34-19336, [1982-83 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,306, at p. 85,651 n.3 (Dec. 5, 1982) ("In either case, acceptance of securities for payment may be further delayed by . . . required regulatory and shareholders' approvals.").

defensive tactics employed by a target[31] and failure or modification of contractual conditions to an offer imposed by the bidder.[32] Fleet unilaterally extended its offer in the present case well beyond the 60-day period, thus reserving to itself by contract the right to do what it contends Federal law forbids —extending the period to purchase tendered shares. The unrebutted evidence of record establishes that many tender offers are not completed in twenty business days. James M. Tobin, Esq. testified as to specific instances where economic defenses such as "poison pills," litigation, and various regulatory provisions under federal law have delayed the consummation of a tender offer beyond that period. He also explained how, in practice, it is possible to comply concurrently with Ohio Revised Code § 1701.831 and the Williams Act. In addition, former SEC Chairman Williams stated in his affidavit that the Ohio statute confers substantial protection to shareholders of Ohio corporations by permitting them to consider the merits of tender offers and the resulting change of control of the corporation, free of the economic coercion otherwise inherent in tender offers. The only evidence of record confirms that the Ohio statute confers substantial protection to shareholders of Ohio corporations, and that the Williams Act and its regulations and the Ohio statute do not conflict.

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[31] *E.g., Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (Mesa's tender offer for 37% of Uñocal announced April 8, 1985 was ultimately defeated by Unocal's defensive exchange offer which was approved by the Supreme Court of Delaware on May 17, 1985); *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47 (2d Cir. 1985) *and* 781 F.2d 264 (2d Cir. 1986) (Hanson made initial offer on August 21, 1985, but its acquisition of control was delayed until January 1986); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (Pantry Pride made initial offer on August 23, 1985, but its acquisition of control was delayed until November, 1985).

[32] *E.g., Schreiber v. Burlington Northern, Inc.*, 105 S. Ct. 2458 (1985) (hostile tender offer announced December 1982 withdrawn, and new, friendly offer announced January 1983, although majority of target shareholders had subscribed to first offer); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982) (offer announced September 14, 1981 and then withdrawn as unsuccessful); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) (offer made on March 21, 1977, but Great Western did not acquire desired number of target shares until fall of 1977).

Plenary consideration of the decision below under the Supremacy Clause is necessary to review what the State of Ohio believes to be a clear error of law, and also to resolve the continuing debate concerning whether and to what extent a State may regulate a tender offer for the shares of one of its corporations. This debate has been extensive since the Court's decision in *MITE*.[33] Moreover, several states have enacted

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[33] Examples of the substantial commentary regarding "second generation" statutes include Block, Barton and Roth, *State Takeover Statutes: "The Second Generation"*, 13 Sec. Reg. L.J. 332 (1986); Cline, *Edgar v. MITE Corp.: Is the Preemption of State Takeover Statutes Complete?*, 1983 Utah L. Rev. 415; Dennis, *Two-Tiered Tender Offers and Greenmail: Is New Legislation Needed?*, 19 Ga. L. Rev. 281 (1985); Grimm, *The Tender Offer Regulation Battle Continues: Should States Regulate Only Local Companies?*, 60 Ind. L.J. 721 (1985); Kozyris, *Corporate Wars and Choice of Law*, 1985 Duke L.J. 1; Kreider, *Fortress Without Foundation? Ohio Takeover Act II*, 52 U. Cin. L. Rev. 108 (1983); Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563 (1983); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 Colum. L. Rev. 249 (1983); Newlin and Gilmer, *The Pennsylvania Shareholder Protection Act: A New State Approach to Deflecting Corporate Takeover Bids*, 40 Bus. Law. 111 (1984); Profusek and Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky, or Corporation Law Concepts*, 7 Corp. L. Rev. 3 (1984); Sargent, *Do the Second-Generation Takeover Statutes Violate the Commerce Clause?*, 8 Corp. L. Rev. 3 (1985); Scriggens and Clarke, *Takeovers and the 1983 Maryland Fair Price Legislation*, 43 Md. L. Rev. 266 (1984); Sell, *A Critical Analysis of a New Approach to State Takeover Legislation after MITE*, 23 Washburn L.J. 473 (1984); Siegel, *Tender Offer Defensive Tactics: A Proposal for Reform*, 36 Hastings L.J. 377 (1985); Steinberg, *State Law Developments: The Pennsylvania Anti-Takeover Legislation*, 12 Sec. Reg. L.J. 184 (1984); Note, *The Constitutionality of the New York Security Takeover Disclosure Act: An Analysis After Edgar v. MITE Corp.*, 48 Alb. L. Rev. 239 (1983); Note, *Second Step Transactions in Two-Tiered Takeovers: The Case for State Regulation*, 19 Ga. L. Rev. 343 (1985); Note, *Can State Tender-Offer Regulation Be Made Constitutional? Edgar v. MITE Corp.*, 20 Hous. L. Rev. 1475 (1983); Note, *Corporate Battles for Control — Edgar v. MITE and the Constitutionality of State Takeover Legislation — The Continuing Saga*, 26 How. L.J. 1483 (1983); Note, *Tender Offers — Edgar v. MITE Corp. and State Tender Offer Regulation*, 9 J. Corp. L. 95 (1983); Note, *Second Generation State Takeover Legislation: Maryland Takes a New Tack*, 83 Mich. L. Rev. 433 (1984); Note, *At the Crossroads of Corporate Takeover Legislation*, 63 Neb. L. Rev. 345 (1984); Note, *Has Ohio Avoided the Wake of MITE? An Analysis of the Constitutionality of the Ohio Control Share Acquisition Act*, 46 Ohio St. L.J. 203 (1985); Note, *Missouri Takeover Regulation: Solving the Shareholder Coordination Problem*, 63 Wash. U.L.Q. 491 (1985).

"second generation" takeover statutes since, or amended their existing statutes in response to, the *MITE* decision.[34] Many of these statutes have been called into question by the decision below and by other cases involving statutes of other States. Many of these cases are based upon unwarranted extensions of the plurality opinion in *MITE*.[35]

In short, the States have relied upon the narrow grounds upon which this Court invalidated the expansive Illinois statute in *MITE*, in light of long and uninterrupted jurisprudence reserving to States the right to legislate rules of corporate governance. The courts below have improperly extended *MITE* beyond its terms, creating substantial uncertainty over the right of States to exercise their historic

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[34] *E.g.*, Hawaii Rev. Stat. tit. 23, §§ 417E-1 to 417E-15, 416-171 to 416-172; Idaho Code §§ 30-1501 to 30-1514; Ill. Rev. Stat. ch. 121-½, §§ 137.1-.16; Ind. Code §§ 23-2-3.01-0.5 to 23-2-3.01-.11, 23-1-42-1 to 23-1-42-11; Kansas Stat. ch. 17, art. 12, §§ 17-1276 to 17-1285; Minn. Stat. §§ 80B.01-.13, 302A.011(37-41), 302A.499(7), 302A.671; Neb. Rev. Stat. §§ 21-2418 to 21-2430; N.J. Stat. §§ 14A:10A-1 to 14A:10A-6; N.Y. Corporations Law § 913; Okla. Stat. tit. 71, §§ 451 - 62; Utah Code Ann. §§ 61-5-1 to 61-5-14; Wis. Stat. §§ 180.25, 180.725.

Moreover, many other States have determined that the medium of corporate governance is the appropriate means through which shareholders of their corporations can be protected from undesirable changes in corporate control. *E.g.*, Ga. Code §§ 14-2-232 to 14-2-235; Ky. Rev. Stat. §§ 271A.397-.399; La. Rev. Stat. §§ 12-132 to 12-134; Me. Rev. Stat. § 910; Md. Corporations and Associations Code §§ 3-601 to 3-603, 8-301; Mich. Comp. Laws §§ 450.1775-.1784.

[35] *See Dynamics Corp. v. CTS Corp., supra*, 794 F.2d at 260-63 (Indiana control share acquisition statute found unconstitutional and preempted by federal law); *Terry v. Yamoshita*, Case No. 85-143, slip op. at 11-15 (D. Hawaii June 13, 1986) (Hawaii control share acquisition statute found to be unconstitutional and preempted by federal law); *APL Limited Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D. Minn.), *vacated*, Case Nos. 85-5285/5286 (8th Cir. Nov. 26, 1985) (Minnesota control share acquisition statute found preliminarily to be unconstitutional on Commerce Clause grounds; judgment later vacated by Court of Appeals); *Icahn v. Blunt*, 612 F. Supp. 1400, 1418-20 (W.D. Mo. 1985) (Missouri control share acquisition Act found unconstitutional).

powers over corporate affairs.[36] A decision by this Court after full consideration of the issue of whether the Ohio statute is within the "room" left by *MITE* for state regulation of tender offers is therefore appropriate. *MITE, supra,* 457 U.S. at 646 (Powell, J., concurring in part).

CONCLUSION

Dismissal of this appeal would signify (1) that the State of Ohio has no legitimate role under the Williams Act in the regulation of proposed control share acquisitions of corporations created under its laws, and (2) that Ohio has no legitimate interest in establishing a procedure of corporate governance that allows shareholders to consider collectively whether to allow a transfer of control of their corporations. The validity of State regulation of traditional corporate changes, such as mergers and consolidations, would be called into question because of their direct burden upon interstate commerce. This case presents a substantial federal question "touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.,* 417 U.S. 62, 65 (1974). The State of Ohio has a direct interest in having plenary consideration of the Court of Appeals' decision striking down one of its laws.

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[36] This uncertainty is reflected in opinions of the United States Court of Appeals for the Seventh and Eighth Circuits — the only Federal appellate court's, besides the court in the present case, which have ruled on the constitutionality of "second generation" State statutes under the Williams Act. *See Cardiff Aquisitions, Inc. v. Hatch,* 751 F.2d 906, 913 (8th Cir. 1984) ("Because the remaining four justices did not reach the [Williams Act] issue, the Court has not definitively resolved whether the view of Justices Powell and Stevens, the view of Justices White, Burger and Blackmun, or some other analysis should apply."); *Dynamics Corp. v. CTS Corp., supra,* 794 F.2d at 263 (acknowledging "lingering doubt that the [Williams] Act really was intended to limit state anti-takeover statutes").

Probable jurisdiction should be noted. If, however, the Court should believe that it lacks jurisdiction either to hear the case on appeal or to reverse summarily, the question presented is nevertheless important, and certiorari should be granted under 28 U.S.C. § 2103.

Respectfully submitted,

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September, 1986

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 86-3533 and 86-3536
(Reported at 796 F.2d 135)

FLEET AEROSPACE CORPORATION
Plaintiff-Appellee

vs.

MARK HOLDERMAN, KENNETH COX,
THE STATE OF OHIO and AERONCA, INC.
Defendants-Appellants

Appeal From The United States District Court, Southern District of Ohio, Eastern Division

Case No. C-2-86-0556

Judge Holschuh

OPINION OF THE COURT
BY CIRCUIT JUDGE WELLFORD,
AFFIRMING

Plaintiff, Fleet Aerospace Corporation (Fleet), a Canadian corporation, filed an action in the Southern District of Ohio on May 21, 1986, challenging the constitutionality of the Ohio Control Share Acquisition Act with respect to its applicability to a cash tender offer made by Fleet to acquire stock of

defendant Aeronca, Inc. (Aeronca), an Ohio corporation. Other defendants in the proceeding were Mark Holderman, acting commissioner and Chief of Securities of the Ohio Division of Securities and Kenneth Cox the Director of Commerce of the Ohio Department of Commerce. The complaint sought "declaratory and injunctive relief barring enforcement" of both the Ohio Take-Over Act[1] and the Ohio Control Share Acquisition Act[2] as "invalid" and "unconstitutional."

The complaint set out that Fleet had commenced "a nationwide, interstate cash tender offer . . . to purchase any and all of the shares of common stock of defendant Aeronca . . . made pursuant to, and in full compliance with the federal Williams Act."[3] As described in *Edgar v. MITE Corp.*, 457 U.S. 624, 627 n. 2, 102 S.Ct. 2629, 2633 n. 2, 73 L.Ed.2d 269 (1982), the Williams Act "requires a purchaser of any equity security registered pursuant to § 12 of the Securities Exchange Act, 15 U.S.C. § 78 to file a Schedule 18D with the Commission within ten days after its purchases have exceeded 5% of the outstanding shares of the security." Aeronca is a publicly traded corporation with thousands of shareholders, the vast majority of whom live outside the state of Ohio, with its principal executive office in Charlotte, North Carolina, and an aerospace manufacturing plant in Middletown, Ohio. The complaint also set out that defendants Holderman and Cox were charged with administering and enforcing the Ohio Take-Over Act, not the Ohio Control Share Acquisition Act.

Jurisdiction in the district court was invoked pursuant to the Supremacy Clause (Art. VI, cl. 2) and the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution and pursuant to the Securities Exchange Act.

The district court granted Fleet's motion for a temporary restraining order against the Ohio official defendants on the basis of the Take-Over Act and against Aeronca on the basis also of the Ohio Control Share Acquisition Act, specifically Ohio Rev. Code Ann. § 1701.831 (Page 1985). At a later preliminary injunction hearing the district court permitted Ohio to intervene. Aeronca had also moved for a preliminary

injunction to prevent Fleet from purchasing its shares until the latter complied with Ohio Rev. Code § 1701.831.[4]

After briefing and a hearing, the district court on June 11, 1986, entered a memorandum and order setting out a statement of facts, evidentiary rulings with respect to proof submitted at and prior to the hearing, and a lengthy and detailed basis for its conclusion that the Ohio Control Share Acquisition Act was unconstitutional under both the Supremacy Clause and the Commerce Clause. Judge Holschuh accordingly denied Aeronca's motion for a preliminary injunction and granted Fleet's motion. He enjoined defendants "from taking any action whatsoever to invoke, enforce, or apply the provisions of Ohio Rev. Code § 1701.831 against plaintiff" in connection with the tender offer. _____ F. Supp. _____ (S.D. Ohio 1986).

Defendants immediately requested an injunction precluding Fleet's tender offer acquisition pending appeal from Judge Holschuh's order. The district court found that defendants ad failed to show a likelihood that they would prevail on the merits, but nevertheless, recognizing the "serious" and "important" legal question involved, granted defendants "an opportunity . . . to obtain a review of the question before events may conceivably render such a review moot." Deciding that a "final determination of invalidity" was for "the appellate courts," and attempting to balance the "public interest" against interest of the private parties before it, the district judge restrained Fleet from purchasing Aeronca shares for twenty-four hours (so defendants could apply for immediate injunctive relief from the Court of Appeals) and further restrained Fleet's purchase until this court might rule on such application by defendants. Also, during the pendency of an appeal by defendants on the merits, Fleet was restrained from voting any Aeronca shares acquired pursuant to the tender offer.

On the day following the district court's orders and notice of appeal, Fleet filed a motion in this court for an emergency order vacating the restraints imposed upon it by the district court. That same day both Aeronca and the State of Ohio also

filed motions in this court for immediate injunctive relief pending their respective appeals. Shortly thereafter, Fleet and Aeronca advised the district court and this court that a conditional revised tender offer, more advantageous to Aeronca shareholders, had been submitted by Fleet and that Aeronca directors had agreed to recommend this proposal, including a subsequent merger, to its shareholders. Accordingly, Fleet and Aeronca filed a motion in this court and in the district court for leave to withdraw their respective motions for injunctive relief pending appeal. The State of Ohio opposed the joint motion, which sought to eliminate immediately any restraint on Fleet's acquiring and voting these Aeronca shares. The district court declined to take any action, deferring to this court to "avoid any possible encroachment . . . on the jurisdiction of the Sixth Circuit Court of Appeals."

This court granted expedited consideration of the matters before it and set the case for a prompt hearing. Before us for consideration are Fleet's and Aeronca's motions for an emergency order vacating the order of the district court, and later a joint motion of Fleet and Aeronca to vacate or to remand to the district court the issues with respect to injunctive relief (and the brief in opposition by the State of Ohio). We are advised that the revised tender offer has been extended to June 30, 1986. The State of Ohio seeks an order of this court setting aside the declaration that the Ohio Control Share Acquisition Act is unconstitutional and appeals from the injunction precluding its enforcement in this case.

At the oral argument counsel for all parties have requested that this court consider the expedited appeal on its merits, not merely the question of the nature, extent and propriety of injunctive relief heretofore granted by the district court and the questions of staying that action or granting further injunctive relief by this court. The parties have submitted extensive briefs on the injunctive relief issues and on the merits of the constitutionality of the Ohio Control Share Acquisition Act. Counsel addressed fully at oral argument the constitutionality of the Ohio law at issue.

A.

We consider first whether the later developments in this case following the decision of the district court have rendered the issues moot, whether there is a live and justiciable controversy before us. Fleet takes the position that, in view of its agreement with Aeronca's management caused by Fleet's amended and increased cash tender offer and Fleet's withdrawal of the original offer, the intervenor defendant State of Ohio has no standing to pursue this appeal. Ohio, however, argues that it intends to enforce the statute in question and that it has not only the duty but also the right to be heard with regard to a district court holding, now on appeal, that the state statute in controversy is unconstitutional with the accompanying order enjoining the State from enforcing that statute. We agree with the State of Ohio that there is before us a justiciable controversy and that we are called upon to make a decision on the issues that have been presented involving the constitutionality of the Ohio Control Share Acquisition Act.

The constitutional issue is clear. *See MITE Corp. v. Dixon,* 633 F.2d 86 (7th Cir. 1980), *aff'd on the jurisdictional issue,* 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982); *National Association of Letter Carriers v. Sombrotto,* 449 F.2d 915 (2d Cir. 1971); *see also Thornburgh v. American College of Obstr. & Gyn.,* _____ U.S. _____, _____ - _____ n. 1, 106 S.Ct. 2169, 2173 n. 1 (1986) (White, J., dissenting). We conclude that the State of Ohio has standing before this court to contest the district court decision that the Ohio statute is unconstitutional on its face and in its application to this dispute. *Maine v. Taylor,* _____ U.S. _____, 106 S.Ct. 2440, 90 L.Ed. 2d _____ (June 24, 1986). Following *MITE,* we find that since the State of Ohio has indicated that it intends to enforce the Act against Fleet unless precluded by an injunction from doing so, the issues before us are not moot. 633 F.2d at 490; 457 U.S. at 630, 102 S.Ct. at 2634.

B.

The district court discussed in detail the meaning, intended applicability, and effect of the Ohio Control Share

Acquisition Act. It analyzed the Ohio Act in conjunction with the Williams Act and concluded, first, that the Ohio Act conflicted with the Supremacy Clause, citing among other authorities for its conclusion, *Edgar v. MITE Corp.*, and this court's decision in *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 565 (6th Cir. 1982). Acknowledging that "Congress has not explicitly prohibited states from regulating takeovers" of the type proposed by Fleet, the district court concluded that the Ohio Act "frustrates the objectives of the Williams Act in a substantial manner." The district judge also held that the Ohio Act "impermissibly tips the scales in favor of incumbent management by requiring a shareholder vote," and by creating a delay. We agree substantially for the reasons expressed by Judge Holschuh.[5]

Judge Holschuh also decided, after a careful consideration of the implications of the Ohio Control Share Acquisition Act, that it impacted substantially on interstate commerce. He concluded that it constituted a direct regulation upon, as well as an indirect burden on, interstate commerce that violated the Commerce Clause. He cited recent decisions of similar effect with respect to other states' efforts to deal with tender offers of the type involved in this case. *See Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250 (7th Cir. 1986); *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985). We agree also that the Ohio law in question offends the Commerce Clause for essentially the reasons stated by the district court. Accordingly, we hold that the Ohio Control Share Acquisition Act is unconstitutional for this additional reason.

We conclude that Ohio Rev. Stat. § 1701.831 is unconstitutional and AFFIRM the district court's judgment that the State of Ohio is therefore enjoined from enforcing it. The injunction prohibiting Fleet from acquiring Aeronca shares is set aside, as is the injunction prohibiting Fleet from voting the Aeronca shares so acquired. The mandate will issue on June 30, 1986, to permit the State of Ohio to seek a stay.[6]

Entered June 25, 1986

(s) Wellford, Circuit Judge

FOOTNOTES

1. The district court dismissed without prejudice Fleet's claim that sections 1707.041 and 1707.042 of the Ohio Revised Code (the anti-fraud provisions of the Take-Over Act) were unconstitutional because the claim failed to present a case or controversy. The ruling and statute is not before us on this appeal.

2. See Ohio Rev. Code § 1701.831 and the legislative "findings" in § 1701.832, which form the purported basis for the Control Share Acquisition Act provisions.

3. The Williams Act, 82 Stat. 454, codified at 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f), added new §§ 13(d), 13(e), and 14(d)-(f), to the Securities Exchange Act of 1934.

4. We set out the substance of Ohio Rev. Code § 1701.831:

> (A) Unless the articles or the regulations of the issuing public corporation provide that this section does not apply to control share acquisitions of shares of such corporation, any control share acquisition of an issuing public corporation shall be made only with the prior authorization of the shareholders of such corporation in accordance with this section.
>
> (B) Any person who proposes to make a control share acquisition shall deliver an acquiring person statement to the issuing public corporation at the issuing public corporation's principal executive offices. Such acquiring person statement shall set forth all of the following:
>
> (1) The identity of the acquiring person;
>
> (2) A statement that the acquiring person statement is given pursuant to this section;
>
> (3) The number of shares of the issuing public corporation owned, directly or indirectly, by the acquiring person;

(4) The range of voting power, described in division (Z)(1)(a), (b), or (c) of section 1701.01 of the Revised Code, under which the proposed control share acquisition would, if consummated, fall;
(5) A description in reasonable detail of the terms of the proposed control share acquisition;
(6) Representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.

(C) Within ten days after receipt of an acquiring person statement that complies with division (B) of this section, the directors of the issuing public corporation shall call a special meeting of shareholders of the issuing public corporation for the purpose of voting on the proposed control share acquisition. . . .

(D) Notice of the special meeting of shareholders shall be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for such meeting . . . accompanied by both of the following:
(1) A copy of the acquiring person statement delivered to the issuing public corporation pursuant to this section;
(2) A statement by the issuing public corporation, authorized by its directors, of its position or recommendation . . . .

(E) The acquiring person may make the proposed control share acquisition if both of the following occur:
(1) The shareholders of the issuing public corporation who hold shares of such corporation entitling them to vote in the election of directors authorize such acquisition at the special meeting . . . by an affirmative vote of a majority of the

voting power . . . and a majority of the portion of such voting power excluding the voting power of interested shares . . . .

(2) Such acquisition is consummated, in accordance with the terms so authorized, not later than three hundred sixty days following shareholder authorization. . . .

5. We have reservations, however, about the district court's conclusionary statement that *MITE Corp.* "sounded the death knell for state control of federally regulated tender offers," if the court meant by this statement that *all* state regulation regarding tender offers is foreclosed. See the concurring opinions of Justice Powell and Justice Stevens, 457 U.S. at 646, 647, 655, 102 S.Ct. at 2642, 2643, 2647.

6. The State of Ohio requested this opportunity in its original motion filed in this court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C-2-86-0556

FLEET AEROSPACE CORPORATION
Plaintiff

v.

MARK HOLDERMAN, KENNETH COX
STATE of OHIO, and AERONCA, INC.
Defendants

MEMORANDUM AND ORDER OF THE COURT
BY JUDGE HOLSCHUH

I. INTRODUCTORY

This case presents a direct challenge to the constitutionality of Ohio legislation enacted in response to the Supreme Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), which "sounded the death knell for state control of federally regulated tender offers."[1] The Ohio Control Share Acquisition Act attempts to restrict federally regulated tender offers in a different manner and to a different degree than the "first generation" of such state statutes but, as discussed below, the state statute in question still has an unconstitutional effect. All courts to date that have considered similar control share acquisition acts have held them to be unconstitutional, as does this Court in the opinion that follows. After careful consideration of the evidence presented and the arguments of the parties, the Court is left with the firm opinion that the Ohio legislation in question runs afoul of both the Supremacy Clause and the Commerce Clause of the Constitution and is, therefore, unenforceable.

II. PROCEDURAL HISTORY

Plaintiff Fleet Aerospace Corporation (Fleet) brought this action on May 21, 1986, seeking declaratory and injunctive relief to bar enforcement of Ohio Rev. Code §§ 1707.041, 1707.23, and 1707.26 (the Ohio Takeover Act and its enforcement statutes), § 1701.831 (the Ohio Control Share Acquisition Act). Plaintiff sought to have these statutes declared unconstitutional in relation to its cash tender offer for shares of common stock of defendant Aeronca, Inc. as violative of Article I, § 8, cl. 3 (the Commerce Clause) and Article VI, cl. 2 (the Supremacy Clause) of the United States Constitution. This Court's jurisdiction has been invoked pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and 28 U.S.C. §§ 1331, 1337(a) and 1343(a).

On May 21, 1986 this Court granted plaintiff's motion for a temporary restraining order against defendants Mark Holderman, acting commissioner and chief of securities for the Ohio Division of Securities, and Kenneth Cox, director of commerce for the Ohio Department of Commerce, with respect to Ohio Rev. Code §§ 1707.041, 1707.042, 1707.23, and 1707.26 and against defendant Aeronca with respect to Ohio Rev. Code §§ 1707.041, 1707.042, 1707.23, 1707.26, and 1701.831. The Order was clarified by a subsequent Order dated May 23, 1986. On June 2, 1986 the temporary restraining order was continued until 4:00 p.m. on June 11, 1986. At the beginning of the hearing on plaintiff's motion for a preliminary injunction held on June 2 and 3, 1986, the Court permitted the State of Ohio to intervene in the action. It also dismissed plaintiff's claims with respect to Ohio Rev. Code § 1707.041 on the ground of mootness. On June 2, 1986 defendant Aeronca filed a motion for a preliminary injunction to enjoin plaintiff from purchasing any of defendant's shares until plaintiff complied with Ohio Rev. Code § 1701.831. The following constitutes the findings of this Court as to the various issues raised by the parties in their motions and at the hearing of this matter.[2]

III. STATEMENT OF FACTS

Plaintiff Fleet is incorporated under the laws of Ontario, Canada and has its principal executive offices in St. Catharines, Ontario, Canada. It is engaged in the manufacture of components and subsystems for the aerospace and marine industries. Defendant Aeronca is incorporated under the laws of Ohio with its principal executive offices in Charlotte, North Carolina. Its principal business is located in Middletown, Ohio and involves manufacturing and supplying components to the aerospace industries.

Defendant Aeronca's stock is registered pursuant to Section 12(b) of the Securities Exchange Act of 1934 and is actively traded on the American and Pacific Stock Exchanges. According to the affidavit of Victor LaTessa, a trust officer of Ameritrust Co., as of May 19, 1986 there existed 2,741 shareholders of record of the common stock of defendant Aeronca. Four hundred and thirty-three (433) of these shareholders have record addresses in the State of Ohio. The records also indicate that 2,989,161 common shares of defendant Aeronca were issued and outstanding as of May 19, 1986 and at least 106,276 of these shares were held by shareholders with Ohio addresses.

On May 21, 1986 plaintiff commenced a nationwide tender offer for any and all shares of common stock of defendant Aeronca at a price of $5 per share which, at the time, was above the current market price being offered for the stock. On the same day plaintiff filed the present action in this Court.

IV. EVIDENTIARY RULINGS

As an initial matter, several issues must be resolved prior to ruling on the cross motions for a preliminary injunction. Each of these issues is discussed below.

A. TESTIMONY OF ATTORNEY JAMES M. TOBIN

At the preliminary injunction hearing, the state defendants called attorney James M. Tobin as an expert witness as to practices which occur in the tender offer area. Plaintiff objected to Mr. Tobin's testimony on the ground that practices under a tender offer were not relevant to the present controversy. Plaintiff stated it was not objecting to Mr. Tobin's qualifications an a expert witness and that it would stipulate that Mr. Tobin was knowledgeable in the area of tender offers.

While it may be conceded that Mr. Tobin is qualified by his experience as a practicing attorney to render opinions regarding the specialized area of corporate law practice dealing with tender offers, it is obvious that as a member of the Advisory Board of the Ohio Division of Securities and chairman of its tender offer advisory group, and as chairman of the Ohio State Bar Association's tender offer subcommittee which conceived, drafted and supported the Ohio Control Share Acquisition Act, Mr. Tobin clearly is not a disinterested witness in terms of the ultimate issue of the constitutionality of that Act. Although the Court has the highest regard for Mr. Tobin, it appeared to the Court that his testimony was framed more as an advocate's argument in support of the constitutionality of the legislation than as an expert's opinion regarding any factual issues to be resolved by the Court. Finally, while Mr. Tobin is clearly entitled to his own views of the effects of cash tender offers, based upon his own experience, those views are of little consequence when they conflict with the basic premises underlying Congress' enactment of the Williams Act. The Court, while overruling plaintiff's objection as to the relevancy of Mr. Tobin's testimony, has taken these matters into consideration in arriving at the weight to be given Mr. Tobin's testimony in resolving the ultimate issue of the constitutionality of the Ohio Control Share Acquisition Act.

B. THE AFFIDAVIT OF JOHN J. GAVIN

At the same hearing, plaintiff offered into evidence plaintiff's exhibit B. Exhibit B is the affidavit of John J. Gavin, an

executive vice president of D. F. King and Co., Inc., the information agent for plaintiff. The affidavit is submitted for the avowed purpose of showing that a preponderance of the shares of common stock of Aeronca is held by persons residing outside the State of Ohio.

The state defendants and Aeronca objected to the admissibility of exhibit B on the ground that it was delivered outside the requirements of Fed. R. Civ. P. 6. The defendants also objected to the substance of the affidavit, which allegedly contains unsubstantiated hearsay and "secret information" that should not be given any weight by this Court.

Fed. R. Civ. P. 6(d) requires that when a motion is supported by an affidavit, the affidavit shall be served with the motion. The rule further requires that opposing affidavits may be served not later than one (1) day before the hearing, "unless the court permits them to be served at some other time." Fed. R. Civ. P. 6(d). The Court can discern no significant prejudice to the defendants by permitting the affidavit of Mr. Gavin to have been served upon them at the hearing.

The reason there is no prejudice to the defendants is because Mr. Gavin's affidavit corresponds to the affidavit of Victor LaTessa, admitted as defendant Aeronca's exhibit 3. Both affidavits attempt to identify the domicile of shareholders of Aeronca common stock. Both affidavits tend to show that a substantial amount of Aeronca common stock is held by residents of states other than Ohio. In fact, although Mr. Gavin concludes that at least 41.4 percent is held by nonresidents of Ohio, Mr. LaTessa's affidavit states that only 15.79 percent of Aeronca's shareholders have record addresses in the state of Ohio.

The defendants object to the admissibility of exhibit B on the ground that it contains unsupported hearsay and "secret information." The defendants acknowledge the different standards to be used in determining the admissibility of an affidavit submitted in support of a Fed. R. Civ. P. 65 preliminary injunction as opposed to an affidavit in support of

a Fed. R. Civ. P. 56 summary judgment motion, see Wright & Miller, 11 Federal Practice and Procedure § 2949, but argue that exhibit B should be given no weight. In the context of a Rule 65 motion, the Court finds that exhibit B is admissible, and, therefore, defendants' objection to the admission of plaintiff's exhibit B is overruled.

C. THE AFFIDAVIT OF HAROLD M. WILLIAMS

The state defendants requested that the record of the hearing be held open for the purpose of submitting an affidavit of Harold M. Williams, president and chief executive officer of the J. Paul Getty Trust and a former chairman of the Securities and Exchange Commission. Because of the severe time constraints resulting from the need to rule on the plaintiff's motion for preliminary injunction by June 11, 1986, and for the reasons stated from the bench, the Court closed the record at the conclusion of the hearing on June 3, 1986, but without prejudice to the defendants moving to reopen the record for this purpose after Mr. Williams' affidavit had been obtained. Defendants subsequently filed such a motion and tendered the June 5, 1986 affidavit of Mr. Williams.

Although the Court grants defendants' motion and will consider the affidavit of Mr. Williams as a part of the record, it is, for the most part, an expression of Mr. Williams' personal view that "the ever-present threat of takeovers imposes costs upon the economy, which generally cannot be quantified but which are nevertheless real and substantial." He believes that management's fear of takeovers has adverse effects on the efficiency and productivity of a corporation and that "these effects are contrary to the long-term goals of this nation and undermine our economic strength at a time when our competitiveness in world markets is already dangerously impaired." The affidavit is primarily an argument that "the takeover phenomenon of the last decade" has not been good for this nation's economy and, indeed, has had harmful effects, but this is an argument that more properly should be addressed to Congress in support of curtailment of interstate tender offers. In resolving the present constitutional issues, it

is not the function of this Court to decide whether tender offers have a "good" or "bad" effect on the nation's economy.

Mr. Williams also expresses his opinion that the OCSAA "will support precisely the type of informed consideration by shareholders of long-term corporate goals and interests that is necessary to this nation's economic well-being." While the Court respects Mr. Williams and appreciates the sincerity of his viewpoint toward the effect of tender offers on the nation's economy, his affidavit primarily advocates a national economic policy position and is of little aid to the Court in resolving the specific constitutional issues raised by the Ohio Control Share Acquisition Act.

V. THE ANTI FRAUD PROVISIONS OF OHIO REV. CODE § 1707.042

Plaintiff moves for a preliminary injunction enjoining the state defendants and defendant Aeronca from enforcing the provisions of Ohio Rev. Code § 1707.042,[3] which is an anti-fraud provision relating to control bids.[4] Section 1707.042 forbids any person making or opposing a control bid from (1) making any untrue statement of material fact, or any omission of a material fact that would make a statement not misleading; (2) engaging in any act, practice, or course of business which operates as a fraud or deceit upon any offeree; or (3) engaging in any manipulative act or practice. A violation of the provisions of section 1707.042 subjects a person to criminal prosecution under Ohio Rev. Code § 1707.23(E)[5] and injunctive relief under section 1707.23(H).[6] Plaintiff contends that the anti-fraud provision is an unconstitutional burden on interstate commerce in violation of the Commerce Clause because it may operate to delay, and perhaps defeat, a tender offer made in interstate commerce. Plaintiff argues that the requirements of section 1707.042 impose additional costs and burdens on a tender offeror and, therefore, unconstitutionally burden interstate commerce. Finally, plaintiff contends that the Ohio anti-fraud provisions violate the Supremacy Clause

because Section 14(e) of the Exchange Act, 15 U.S.C. § 78n(e), provides the exact same protection to all shareholders as that which is provided to Ohio resident shareholders by the Ohio statute.

The threshold question presented by plaintiff's motion concerning section 1707.042 is whether there is a live case or controversy presented sufficient to confer subject matter jurisdiction on this Court. Article III of the Constitution of the United States requires that parties seeking to invoke the power of federal courts must allege an actual case or controversy. *O'Shea v. Littleton,* 414 U.S. 488 (1974); *Brown v. Ferro Corp.,* 763 F.2d 798, 801 (6th Cir. 1985). Federal courts are without power to resolve disagreements, whatever their nature, that fail to meet this jurisdictional prerequisite. *Flast v. Cohen,* 392 U.S. 83, 96-97 (1968); *Community for Creative Non-Violence v. Hess,* 745 F.2d 697, 700 (D.C. Cir. 1984). Thus, "[t]he mere *potential* for future injury ... is insufficient to render an issue ripe for review." *MCI Cellular Tele. Co. v. F.C.C.,* 738 F.2d 1322, 1333 (D.C. Cir. 1984) (quoting *Alascom, Inc. v. F.C.C.,* 727 F.2d 1212, 1217 (D.C. Cir. 1984) (emphasis in original)).

In the present case, there has been no allegation that plaintiff has committed any act in violation of the anti-fraud prohibitions codified in section 1707.042. There is nothing in the record to even suggest that the state defendants or Aeronca have any cause to invoke section 1707.042.[7] This Court is being asked to render an advisory opinion concerning the constitutionality of an Ohio statute when, in fact, that statute may never be the cause for any action between the parties to this lawsuit. A court is under a constant duty to examine its subject matter jurisdiction and where jurisdiction is lacking, a court must *sua sponte* dismiss a claim or case. The plaintiff's motion for an injunction against enforcement of section 1707.042 of the Ohio Revised Code fails to present a case or controversy sufficient to confer jurisdiction upon this Court; accordingly, the plaintiff's claim that section 1707.042 is unconstitutional is hereby DISMISSED, without prejudice to renewal of the claim in the event the defendants attempt to

invoke that section against plaintiff in connection with plaintiff's tender offer.

VI. STANDARDS FOR THE PARTIES' CROSS MOTIONS FOR PRELIMINARY INJUNCTIONS

This Court has dismissed, without prejudice, plaintiff's claims under Ohio Rev. Code §§ 1707.041 and 1707.042. Plaintiff's motion is therefore now limited to whether a preliminary injunction should issue enjoining the enforcement of Ohio Rev. Code § 1701.831. In its cross motion for preliminary injunction, defendant Aeronca has moved to require plaintiff to comply with the provisions of this statute.

A motion for injunctive relief must be tested against the prerequisites as set forth in *Mason County Medical Association v. Knebel,* 563 F.2d 256, 261 (6th Cir. 1977):

(1) whether the movant has shown a strong or substantial likelihood or probability of success on the merits;

(2) whether the movant has shown irreparable injury;

(3) whether the issuance of a preliminary injunction would cause substantial harm to others; and

(4) whether the public interest would be served by issuing a preliminary injunction.

A party moving for a preliminary injunction must prevail on all four of the above-stated elements before an injunction will be granted.

After careful consideration, and for the reasons more fully explained in this Order, it is the decision of this Court that plaintiff Fleet has met its burden and that a preliminary injunction will therefore issue against defendants' enforcement of O.R.C. § 1701.831.[8]

Because plaintiff Fleet has established a strong or substantial likelihood or probability that O.R.C. 1701.831 is unconstitutional, it is also clear that defendant Aeronca has failed to meet its burden on this prerequisite for injunctive relief and its motion must therefore be denied.

VII. THE OHIO CONTROL SHARE ACQUISITION ACT, OHIO REV. CODE § 1701.831 (OCSAA)

Ohio Rev. Code § 1701.831[9] is part of Ohio's corporation code and is applicable to all Ohio corporations with fifty or more shareholders that have a principal place of business, principal executive offices, or substantial assets within Ohio. Ohio Rev. Code § 1701.01(Y).[10] A very unusual statute enacted at the same time, Ohio Rev. Code § 1701.832,[11] consists entirely of "findings" by the General Assembly of Ohio regarding a tender offer and an accumulation of a large block of a corporation's voting shares with a "potential" for "significant changes in a variety of basic corporate circumstances" involving "the internal affairs of the corporation."[12] The OCSAA governs "control share acquisitions," and applies not only to tender offers but also to open market purchases and privately negotiated block transactions if a certain level of voting power would be attained as a result of the transaction. Ohio Rev. Code § 1701.01(Z)(1).[13] A person proposing to make a "control share acquisition" must deliver to the issuer an "acquiring person statement" which contains the following information: (1) the identity of the acquiring person, (2) a statement that the "acquiring person statement" is given pursuant to section 1701.831, (3) the numbers of shares of the Ohio corporation owned by the acquiring person, (4) the range of voting power the acquiring person would obtain as a result of the acquisition, (5) a description of the proposed acquisition, and (6) representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the acquisition. Ohio Rev. Code § 1701.831(B). Within ten (10) days after the

Ohio corporation receives the "acquiring person statement," it must call a special meeting of shareholders to vote on the proposed acquisition. The meeting must be held within fifty (50) days after receipt of the statement unless a different date is agreed to by the corporation and acquiring person. Ohio Rev. Code § 1701.831(C). Notice must be given to all shareholders and must include a copy of the "acquiring person statement" and a statement by the Ohio corporation of its position or recommendation. Ohio Rev. Code § 1701.831(D). The acquiring person may make the "control share acquisition" on the occurrence of two events: (1) the shareholders at the special meeting at which a quorum is present authorize the acquisition by (a) an affirmative vote of a majority of the voting power and (b) an affirmative vote of a majority of the portion of such voting power excluding the voting power of interested shares; and (2) the acquisition is consummated, according to its terms, not later than 360 days following shareholder authorization. Ohio Rev. Code § 1701.831(E). The statute does not apply to an acquisition that occurs by operation of the laws of intestate succession, through satisfaction of a pledge or other security interest, or, as the result of a merger or consolidation effected in compliance with Ohio law. Ohio Rev. Code § 1701.01(Z)(2).[14] Additionally, the statute permits the Ohio corporation, either by its articles or regulations, to elect that the statute not apply to control share acquisitions of shares of the Ohio corporation. Ohio Rev. Code § 1701.831(A).

It is undisputed that defendant Aeronca has not waived the provisions of the statute in its articles or regulations and that if section 1701.831 were held to be constitutional it would be applicable to the plaintiff's present tender offer. It is also undisputed that plaintiff's present tender offer is subject to the provisions of federal law and specifically to the provisions of The Williams Act and the regulations of the Securities and Exchange Commission promulgated thereunder.

VIII. THE WILLIAMS ACT

The Williams Act was enacted by Congress in 1968 and amended Sections 13 and 14 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78(d)-(f). It was the "congressional response to the increased use of cash tender offers in corporate acquisitions, a device that had 'removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws.' *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 (1977)." *MITE*, 457 U.S. at 632.

The Act and the regulations promulgated thereunder require the offeror, upon the commencement of a tender offer, to disclose certain information to the Securities and Exchange Commission, shareholders of the target company, and the target company. 15 U.S.C. § 78n(d)(1). It requires that the offer remain open for not less than twenty business days. 17 C.F.R. 240.14e-1(a). It permits investors who tender their shares to withdraw them during the first fifteen days of the offer or at any time after sixty days from the commencement of the offer if the offeror has not yet purchased them. 15 U.S.C. § 78(d)(5). If an offer is for less than all of the outstanding shares, and more than the requested shares are tendered, the offeror must purchase the shares on a pro rata basis. 15 U.S.C. § 78(d)(6). All shares tendered must be purchased for the same price, and if an offering price is increased, those who have already tendered receive the benefit of the increase. 15 U.S.C. § 78n(d)(7).

Plaintiff has made a cash offer for any and all shares of defendant Aeronca's common stock. Under the Williams Act and federal regulations promulgated thereunder, plaintiff would be permitted to begin taking down shares on the sixteenth business day after the commencement of the tender offer, *i.e.*, June 12, 1986.

IX. THE SUPREMACY CLAUSE

The first requirement of a preliminary injunction is a showing by the movant of a strong or substantial likelihood or probability of success on the merits. *Mason County Medical Association,* 563 F.2d at 260-62. To show a likelihood of prevailing on the merits, the movant "must show the likely existence of a constitutional violation causally related to the result sought to be enjoined." *Martin-Marietta Corp. v. Bendix Corp.,* 690 F.2d 558, 565 (6th Cir. 1982). Plaintiff contends that the OCSAA is preempted by the Williams Act because it radically upsets the balance Congress sought to maintain between the offeror and the target company by undercutting the Williams Act time periods, thereby creating delay which favors incumbent management. Defendants have argued that the OCSAA does not conflict with the time requirements of the Williams Act and, in fact, that it furthers the objective of the Williams Act by providing additional protection to shareholders of Ohio corporations.

The Supremacy Clause of Article VI to the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." A finding of federal preemption will not be made absent a showing that this was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Congressional intent, however, may be express or implied. *Id.* at 236; *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 633-34 (1973). It will also be found where compliance with both federal and state legislation is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963), or when the state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). In making its decision, the Court must look to the language of the federal legislation not only as it is written, but as it is interpreted and applied. *Jones v. Roth Packing Co.,* 430 U.S. 519, 526 (1977).

The OCSAA was enacted by the Ohio General Assembly, effective November 19, 1982, in response to the Supreme Court decision of *Edgar v. MITE*, 457 U.S. 624 (1982). Although it encompasses other share acquisitions, it is specifically directed to the issue of tender offers. Ohio Rev. Code § 1701.832.[15] In *MITE* the Supreme Court was called upon to decide whether the Illinois Business Takeover Act was preempted by the Williams Act and whether it was violative of the Commerce Clause. *Id.* at 630. A plurality of the Court found the Illinois statute unconstitutional under the Supremacy Clause as frustrating the objectives of the Williams Act in some substantial way. *Id.* at 630-31. A majority of the Court found the Act unconstitutional under the Commerce Clause as imposing an impermissible burden on interstate commerce in relation to the local interests served. *Id.* at 643. The issue which must be resolved by this Court is whether the OCSAA has overcome the infirmities recognized by the Supreme Court in the earlier "first generation" takeover statutes.

Congress has not explicitly prohibited states from regulating takeovers. *See* 15 U.S.C. § 78bb(a). Rather, the issue of whether the OCSAA is preempted by the Williams Act is one left to the courts. *MITE*, 457 U.S. at 631. The decision requires a careful analysis of the federal and state legislation.

The intent of Congress in enacting the Williams Act was to "insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information. . . ." *Piper*, 430 U.S. at 35 (quoting *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975)). The legislative history of the Act reflects a concern by Congress that this information be provided to the shareholder in a neutral setting that favors neither management nor the takeover bidder. Congress took extreme care to avoid "tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2811, 2813. As the Sixth Circuit Court of Appeals pointed out in *Martin-Marietta Corp.*, 690 F.2d at 567-68:

It is clear that in filling the gap, Congress intended that the Williams Act protect investors. It is equally clear, however, that Congress adopted a 'Market Approach,' as opposed to a 'Fiduciary Approach,' in its effort to protect the investor.

> The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.

Attorney General v. Beta-X Corp., 103 Mich. App. 51, 55, 302 N.W.2d 596 (1981), *leave to appeal granted,* 412 Mich. 853, 312 N.W.2d 152 (1981), quoting *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1276 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great Western United Corp.,* 443 U.S. 173, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979).

> The reason for this approach was congressional recognition that tender offers often benefit an investor and that a statute preventing tender offers could harm, rather than protect, investors.

Id., quoting S. Rep. No. 550, 90th Cong., 1st Sess. at 3 (1967) (Senate Report); H.R. Rep, No. 1711, 90th Cong., 2d Sess. at 3 (1968) (House Report); U.S. Code Cong. & Admin. News 1968, p. 2811 (footnotes omitted). Neither favoring incumbent management nor the takeover bidder, Congress adopted a policy of "evenhandedness," thereby permitting the investor to make his own independent but informed decision whether to sell. *Piper v. Chris-Craft Industries,* 430 U.S. at 31, 97 S.Ct. at 944. As set forth in H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976), the basic purpose

> of the Williams Act is "to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success." "According to the Securities and Exchange Commission, delay enables a target company to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an antitrust violation should the tender offer succeed; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; (7) institute litigation challenging the tender offer." *MITE, supra,* _____ U.S. at _____ n. 13, 102 S.Ct. at 2639 n. 13.

See also Hanson Trust PLC v. SCM Corp., 744 F.2d 47, 55 (2d Cir. 1985); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1129 (8th Cir. 1982); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1276 (1978), *rev'd on venue grounds sub nom., Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *APL Limited Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216, 1220 (D. Minn. 1985). Accordingly, although the primary purpose of the Williams Act is disclosure to the shareholder in the takeover setting, it was also the "expressed legislative intent . . . to preserve a neutral setting in which the contenders could fully present their arguments." *Schreiber v. Burlington Northern, Inc.*, 105 S.Ct. 2458, 2463 (1985).

An analysis of the OCSAA convinces this Court that it frustrates the objectives of the Williams Act in a substantial manner. First, it permits delay in the take down of the tendered shares beyond the time frame set forth in the Williams Act. Second, it impermissibly tips the scales in favor of incumbent management by requiring a shareholder vote which, as counsel for defendant Aeronca agreed, will usually compel the offeror to engage in a proxy fight in the hope of being able to complete its tender offer. Third, it prevents the individual investor from deciding whether to sell his or her stock to the offeror and places the decision in the hands of other shareholders of the target company.

A. CREATION OF DELAY IN RIGHT TO PURCHASE TENDERED SHARES

Although the Williams Act does not require an offeror to purchase tendered shares on a specific date, the Williams Act and regulations promulgated thereunder permit plaintiff to begin purchasing shares on the sixteenth business day following the commencement of the tender offer. Under the OCSAA, however, the right of the offeror to purchase and the right of the stockholder to sell to the offeror under federal law are thwarted, and the purchasing date can be delayed by the management of the target company as long as fifty days following the commencement of the tender offer. Applied to the present case, this means that under the Williams Act and federal regulations promulgated thereunder plaintiff could begin purchasing shares on June 12, 1986. Under the OCSAA, assuming a shareholders' meeting is held promptly, that the shareholders approve the tender offer, that a tabulation of votes occurs on the same day, and that no one contests the vote, plaintiff's ability to purchase the stock would be delayed until July 10, 1986. Although defendants argue that the shareholder meeting can be held and a decision reached prior to the sixty day period set forth in the Williams Act when a shareholder can again withdraw his unpurchased shares, this does not resolve the problem of permitting incumbent management a long period of delay in which defensive measures can be taken to thwart the acquisition of stock by the offeror.

Congress "recognized that delay can seriously impede a tender offer" and sought to avoid this problem. *MITE*, 457 U.S. at 637-38. As was stated by the Seventh Circuit in *Dynamics Corp. of America v. CTS Corp.*, Case Nos. 86-1601, 86-1608, slip op. at 31, (7th Cir. May 28, 1986), which found the Indiana control share acquisition statute to be preempted by the Williams Act, "[I]f the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana Act if the target company so chooses." Congress also recognized the

consequences of delay when it enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 12 *et seq.*:

> [I]t is clear that this short waiting period [the 10 day period for proration provided in § 14(d)(6) of the Securities Exchange Act of 1934 which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success.

H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Ad. News 2637, 2644.

Similarly, the lengthy delay required by the OCSAA undermines the basic policy of the Williams Act to maintain a neutral policy towards cash tender offers and tilts the carefully balanced scales in favor of incumbent management. In its brief, the state defendants argue that the fifty day time period in which to call a meeting is reasonable because it allows "sufficient time to prepare the necessary proxy solicitation materials; receive SEC clearance of these materials, 17 C.F.R. § 240.14a-6; distribute the proxy materials to the shareholders; and allow the shareholders sufficient time to read the materials and return their proxies." Brief of state defendants at pp. 70-71. This time period also provides incumbent management, of course, with additional time in which to defeat the tender offer. While the offeror is forbidden from acquiring any stock, there is no provision in the OCSAA barring the target company from taking defensive measures, including reacquiring its own stock. *See* Ohio Revised Code § 1701.47(C). As recognized by the Court in *MITE:*

> In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay . . . . Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a state with an anti-takeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly —and less successful. Should this happen, it will mean that the shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer.

MITE, 457 U.S. at 638, n. 14 (quoting 12 Cong. Rec. 30877 (1976)).

B. IMPOSITION OF BURDENS ON OFFEROR BY A REQUIRED SHAREHOLDER VOTE OF APPROVAL

The OCSAA not only causes delay by its time requirements but, by requiring an affirmative vote of the shareholders of the target company, it realistically converts a tender offer into a proxy contest before the offeror will be able to purchase tendered shares.[16] Requiring an offeror to run the gauntlet of not only pursuing its tender offer but facing the probability of a proxy contest with its additional expense and potential for delays in announcing the shareholder vote, adjournments, vote challenges and similar procedural tactics, not only raises the possibility of an offeror being unable to complete the Ohio process prior to the 60 day withdrawal period, but may discourage offerors from pursuing tender offers and/or, at the least, imposes upon the offeror an additional costly and time consuming burden in connection with cash tender offers.[17] *See also Kennecott Corp. v. Smith*, 637 F.2d 181, 188-89 (3d

Cir. 1980). This is contrary to the congressional intent of preserving a neutral setting in a takeover situation, *see Schreiber,* 105 S.Ct. at 2463, and impermissibly tips the scales in favor of incumbent management.

Although the original Williams Act legislation was pro-management, subsequent committee hearings recognized that takeover bids could often serve a useful function and that entrenched management tended to be successful in fending off possibly beneficial takeover attempts. *Piper,* 430 U.S. at 30. *See also Dynamics Corp. of America, supra,* at pp. 28-30. Congress therefore made it "crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder." *MITE,* 457 U.S. at 633. The process envisioned under the OCSAA fails to maintain this evenhanded balance.

C. DEPRIVAL OF SHAREHOLDER'S INDEPENDENT DECISION TO SELL TO OFFEROR

The "function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments *and then to let the investor decide for himself." Great Western United Corp.,* 577 F.2d at 1276 (emphasis added); *MITE,* 457 U.S. at 639 ("Congress intended for investors to be free to make their own decisions."); *Martin-Marietta Corp.,* 690 F.2d at 567 (Congressional policy is to permit the investor "to make his own independent but informed decision whether to sell."). Rather than permitting the investor to make his or her own independent decision in a neutral atmosphere, the OCSAA requires the investor to be bound by the collective decision of other shareholders of the target company. This same concern was recognized by the court in *Icahn, supra,* holding the Missouri Control Share Acquisition Act invalid under the Supremacy Clause. As in the case of the Missouri Act, the OCSAA not only applies to tender offers but to any acquisition which would permit the offeror to exercise a given level of

voting power. Although the statute in *Icahn* required a super-majority vote, as compared to the two-tiered majority vote requirement in the OCSAA, the analysis is the same:

> Section 13 of the Williams Act and the implementing regulations do not limit the number of shares that can be acquired by means of open market purchases or establish any timetable for acquiring shares. Furthermore, a shareholder in the target company was to be left free to make an informed choice whether to sell and obtain the benefit, if any, of the demand for the shares created by the purchaser.
>
> Missouri's control share acquisition procedures interfere directly with the § 13 approach by preventing a person seeking a control share acquisition from buying shares on the open market until shareholder approval has been obtained. Also, whether a shareholder would ever be able to sell into a market influenced by the presence of the purchaser would not depend on the investor's informed decision, but on the decision of a super-majority of all shareholders of the target company. Thus, deciding whether to buy or to sell would be taken out of the hands of the shareholder and the purchaser and placed in the hands of management and other shareholders.

Icahn, 612 F. Supp. at 1420.

Accordingly, because the Ohio Control Share Acquisition Act, Ohio Rev. Code § 1701.831, forces delay in the acquisition of shares in a tender offer contrary to the Williams Act, places unreasonable burdens on the offeror in obtaining the right to purchase shares, and denies to a shareholder the ability to make an independent decision to sell or not to sell to the offeror, it conflicts with and frustrates the objectives of the Williams Act. The Court therefore finds it to be invalid under the Supremacy Clause.

X. THE COMMERCE CLAUSE

Plaintiff also contends that it is entitled to a preliminary injunction against any attempt by the defendants to enforce section 1701.831 on the ground that the OCSAA violates the Commerce Clause of the United States Constitution. Plaintiff argues that the OCSAA violates the Commerce Clause because it is an attempt by Ohio to impose a direct regulation on interstate commerce. In addition, plaintiff submits that the OCSAA does not serve any legitimate local objective that is sufficient to outweigh the excessive burden on interstate commerce imposed by the OCSAA.

The state defendants argue that the OCSAA is a constitutional exercise of Ohio's power to regulate its corporations' internal affairs and to protect shareholders of Ohio corporations. The state contends that it has decided that control of a corporation is a corporate asset, the sale of which profoundly affects internal corporate affairs and corporate governance; consequently, the state argues that it may provide a framework for the orderly disposition of tender offers similar to the system used for mergers, consolidations, liquidations, and other organic changes in corporate structure. Further, the state defendants argue that the power to regulate the internal affairs of an Ohio corporation necessarily includes the power to regulate shareholders of an Ohio corporation, in their capacity as shareholders, regardless of where those shareholders reside. Finally, the state defendants submit that the OCSAA regulates in an area traditionally left to the states and only incidentally infringes on interstate commerce, so that the statute does not violate the restrictions imposed by the Commerce Clause.

Defendant Aeronca contends that the Court should apply a deferential standard of review since the statute involves issues of corporate governance that are local in nature. Under this deferential standard, Aeronca argues that since the state acted pursuant to a permissible purpose, *i.e.*, the regulation of internal corporate affairs, and since the statute is not "wholly

irrational" in light of this purpose, the Court cannot find that the statute is unconstitutional. Both Aeronca and the state defendants contend that under the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the legitimate public interests served by the OCSAA clearly outweigh any incidental effects the statute has on interstate commerce.

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. It is well established that the Commerce Clause limits the power of the States to enact legislation affecting interstate commerce. *Lewis v. BT Investment Manager, Inc.*, 447 U.S. 27, 35 (1980); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976); *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946); *Cooley v. Board of Wardens*, 12 How. 299 (1852). The Commerce Clause prohibits direct regulation of interstate commerce by any of the several States. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 775 (1945); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925). A State may, however, exercise its regulatory power so that there is an impact on interstate commerce as a result of the regulation without violating the Commerce Clause. In such a case, a State statute is valid if it "regulates evenhandly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental...unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Bruce Church*, 397 U.S. at 142.

The plaintiff has shown a substantial likelihood that it will succeed on the merits of its claim that the OCSAA violates the Commerce Clause of the United States Constitution. Plaintiff Fleet has shown that the OCSAA is an attempt by Ohio to directly regulate interstate commerce in the market for a control share of an Ohio corporation. Further, plaintiff has shown that the asserted state interests supporting the statute do not outweigh the substantial burden on interstate commerce caused by the OCSAA.

A. THE OHIO ACT AS A BURDEN ON INTERSTATE COMMERCE

The OCSAA directly regulates, and prevents if its terms are not satisfied, interstate tender offers for shares of stock of Ohio corporations and the interstate transactions associated with such tender offers. It is not disputed that in the present case plaintiff's tender offer involves interstate commerce in the purchase and sale of securities of the defendant Aeronca. Nor is it disputed that the OCSAA sets forth restrictions on plaintiff's tender offer that, in effect, prevent plaintiff from concluding interstate transactions with Aeronca shareholders who reside in Ohio *and* with Aeronca shareholders who live in other states. Until plaintiff obtains majority shareholder approval for its tender offer, it is prohibited by the OCSAA from purchasing Aeronca shares in interstate commerce in accordance with its tender offer.

The OCSAA purports to apply to plaintiff's tender offer for shares of stock of Aeronca even if not one of Aeronca's shareholders were an Ohio resident. By its terms, the OCSAA applies to every tender offer for a designated number of shares of an Ohio corporation with fifty or more shareholders that either has its principal place of business, or its principal executive offices, or substantial assets in Ohio. Ohio Rev. Code § 1701.01(Y). Thus, the OCSAA could apply to a tender offer which would not involve a single Ohio resident shareholder.

The extraterritorial reach of the OCSAA is emphasized by the fact that the statute would apply to a single sale between two individuals of twenty percent of the stock of an Ohio corporation. Section 1707.01(Z)(1) defines a "control share acquisition" as the acquisition by any person of shares of an issuing public corporation equal to one-fifth or more of the voting power of the corporation. Thus, an individual residing in New York who owned a twenty percent interest in an Ohio corporation could not sell that interest to a California resident without being subject to the OCSAA. That single sale would

require a shareholder meeting and shareholder approval before it could proceed. This emphasizes the direct, extra-territorial restraint on interstate commerce imposed by the OCSAA.

The OCSAA is designed to directly regulate tender offers for Ohio corporations that are initiated and consummated entirely through the channels of interstate commerce. Further, the OCSAA purports to regulate transactions occurring entirely beyond Ohio's borders; this "sweeping extraterritorial effect" and the attempt to assert extraterritorial jurisdiction over persons and property in other States renders the statute invalid as an attempt by the State of Ohio to regulate directly interstate commerce, in violation of the Commerce Clause. *MITE,* 457 U.S. at 643; *Southern Pacific v. Arizona,* 325 U.S. at 775; *Farmers Grain,* 268 U.S. at 199; *Icahn,* 612 F. Supp. at 1415; *Martin-Marietta Corp.,* 690 F.2d at 566.

As the Seventh Circuit Court of Appeals stated, with reference to a similar statute, the Control Share Acquisition Act of the State of Indiana:

> ...the effect on the interstate market in securities and corporate control is direct, intended, and substantial; it is not merely the incidental effect of a general regulation of internal corporate governance.

Dynamics Corporation of America, supra, at p. 36. The OCSAA has the identical effect on interstate commerce — it is direct, intended and substantial and, contrary to the arguments of defendants, not merely an incidental effect of a general regulation of the internal affairs of Ohio corporations.

Similarly, in *MITE,* the Supreme Court pointed out that the state statute regulating tender offers in question in that case "could be applied to regulate a tender offer which would not affect a single Illinois shareholder" and concluded that the statute was "a direct restraint on interstate commerce and that

it has a sweeping extraterritorial effect." *MITE,* 457 U.S. at 642. The same, of course, can be said with respect to the OCSAA.

B. THE LOCAL BENEFITS OF THE OHIO ACT DO NOT OUTWEIGH THE BURDENS ON INTERSTATE COMMERCE

The Ohio Act is also unconstitutional under the test enunciated in *Bruce Church,* 397 U.S. at 142. This is because "even when a state statute regulates interstate commerce indirectly, the burden imposed on that interstate commerce must not be excessive in relation to the local interests served by the statute." *MITE,* 457 U.S. at 643.

Clearly, the OCSAA imposes a substantial burden on interstate commerce. It effectively prevents a purchaser of certain shares of stock in interstate commerce from making those purchases unless and until the requirements of the Ohio statute have been satisfied. The statutorily required shareholder vote approval may well block a nationwide tender offer for the purchase of thousands of shares of stock in interstate commerce. The plurality in *MITE* recognized the substantial effects on interstate commerce of such a result:

> Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced. See Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161, 1173-1174 (1981); Fischel, Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tenders Offers, 57 Texas L. Rev. 1, 5, 27-28, 45 (1978); H.R. Rep. No. 94-1373, p. 12 (1976).

MITE, 457 U.S. at 643-44. Although stated in the context of a state statute that allowed a state secretary of state to block a nationwide tender offer, the observation is no less true when a state statute places that same power in a required two-tiered majority vote of shareholders which may, in the end, represent only a minority of the voting power of the corporation.

In support of the OCSAA, the State of Ohio advances two state interests that it claims justify the burden on interstate commerce imposed by the statute. First, Ohio contends that it has a legitimate state interest in regulating the internal affairs of its corporations which extends to policing any changes in corporate control caused by tender offers. Second, Ohio argues that the power to regulate the internal affairs of Ohio corporations includes the power to regulate shareholders of an Ohio corporation regardless of where they reside. Finally, Aeronca argues that the statute helps to protect the business climate of the state by protecting Ohio corporations from wholesale raids by foreign companies. It is clear to this Court, as it was in *MITE*, that these interests are insufficient to outweigh the burdens the Ohio statute imposes on interest [*sic*] commerce.

In the present case, Ohio argues that it is not regulating tender offers as such; instead, it is claimed that the OCSAA is designed to regulate changes in corporate control. Ohio argues that there is, in actuality, no distinction between a tender offer and a merger, consolidation, or other reorganization voluntarily undertaken by the board of directors of a corporation.

In fact, the distinction between a tender offer to purchase shares of stock and a decision by a board of directors and stockholders to change a corporate form or organization is so fundamental that it cannot be disregarded. A merger or other type of voluntary reorganization necessarily involves a basic change in the internal structure of a corporation. A tender offer does not in itself involve any corporate action or change in the internal structure of a corporation; instead it involves transac-

tions between an interested purchaser and individual shareholders who may or may not desire to sell the respective shares of stock they own.

The same internal affairs argument advanced by the state of Ohio in the present case was advanced by the State of Illinois in *MITE* to support the constitutionality of the Illinois Takeover Statute. As the Supreme Court acknowledged in *MITE,* the internal affairs doctrine is a conflict of laws principal [*sic*] which recognizes that only one State should have the authority to regulate a corporation's internal affairs, so that a corporation is not subject to conflicting demands. See Restatement (Second) of Conflict of Laws § 302, comment b, pp. 307-308 (1971). While a State may thus regulate the internal affairs of a corporation, the Supreme Court found that a tender offer does *not* come within the ambit of the "internal affairs" of a corporation:

> Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company. *Great Western United Corp. v. Kidwell,* 577 F.2d, at 1280, n. 53; Restatement, *supra,* § 302, Comment e, p. 310.

MITE, 457 U.S. at 645.

In rejecting the same "internal affairs" argument made by the state defendants in the present case, the court in *Van Dusen Air, supra,* succinctly pointed out the contrast between a state's regulation of its corporations in the field of mergers and sales of assets and a state's regulation of shareholders of a corporation who desire to sell their stock. In discussing this distinction between provisions of the Minnesota Business Corporation Act (MBCA), requiring shareholder approval for a merger or sale of assets, and provisions of the Minnesota Control Share Acquisition Act (MCSAA), requiring shareholder approval for acquisition by a purchaser of more than twenty percent of the voting stock of a Minnesota corporation, the court said:

> The state's merger analogy perpetuates the state's confusion between regulation of a corporation and the regulation of those who would trade in shares. One obvious difference between the MCSAA and those provisions of the MBCA requiring shareholder approval for a merger or sale of assets is that the latter only apply to Minnesota corporations. The merger provision of the MBCA restricts the ability of a *Minnesota corporation* to merge. That is a lawful exercise of the state's authority to regulate a legal entity created by state statute. While the MCSAA also applies only to Minnesota corporations, it does not purport to regulate the activities of the corporation; rather, it reaches out and regulates *shareholders* who may or may not be residents of Minnesota.

Van Dusen Air, 622 F. Supp. at 1224 (emphasis in original).

The distinction between tender offer a subsequent utilization of a control share to reorganize a company was also discussed by the court in *Van Dusen Air:*

> The acquisition of shares does not implicate the internal affairs of the target corporation. The use of that power *once the shares have been acquired* may well be a proper subject of state regulation.

Van Dusen Air, 622 F. Supp. at 1223-24 (emphasis in original).

In short, tender offers themselves do not create changes in the internal affairs of the corporation in the sense that mergers and consolidations effect such changes. If the tender offer is successful, it is true that voting control may well be changed, but the changing identity of the shareholder or shareholders owning sufficient stock to exercise control does not of itself change the nature of the corporate entity or alter its internal affairs.

Finally, as noted earlier, the effect of the OCSAA on interstate commerce is substantial and not simply incidental to the exercise of a state's power to regulate the internal affairs of its corporations. As the Seventh Circuit Court of Appeals stated, in rejecting this same "internal affairs" argument in connection with Indiana's Control Share Acquisition Act:

> The Indiana statute is not saved by the "internal affairs" doctrine. This principle of conflict of laws is designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association. *See Edgar v. MITE Corp., supra,* 457 U.S. at 645; Restatement (Second) of Conflict of Laws § 302 (1971). In this case the state is indeed Indiana; but it does not follow that any law which Indiana adopts that affects the internal affairs of Indiana corporations is thereby insulated from review under the commerce clause. We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation; an example is a law that by requiring cumulative voting for the board of directors makes it difficult to oust the entire existing board at one fell swoop. But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial; it is not merely the incidental effect of a general regulation of internal corporate governance. The law in question is an explicit regulation of tender offers; that the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause. Any other conclusion would invite facile evasions of the clause.

Dynamics Corporation of America, supra, at pp. 35-36.

Ohio also contends that its power to regulate the internal affairs of its corporations necessarily includes the power to

govern relations between shareholders. Ohio then argues that it can govern shareholders of an Ohio corporation regardless of where those shareholders reside. In *MITE,* however, the Supreme Court expressly found that "[w]hile protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders." 457 U.S. at 644. *See Dynamics Corp. of America, supra,* at p. 33; *Van Dusen Air, Inc.,* 622 F. Supp. at 1222; *Icahn,* 612 F. Supp. at 1415; *Martin-Marietta Corp.,* 690 F.2d at 566. The OCSAA clearly restricts the right of nonresidents of Ohio to sell their shares to the offeror, and the language of the Sixth Circuit Court of Appeals is equally applicable in this case:

> As to this extraterritorial effect, the provisions constitute an unconstitutional burden on interstate commerce because there exists no legitimate state interest in the protection of nonresident shareholders.

Martin-Marietta Corp., 690 F.2d at 566.

Finally, Aeronca argues that the State of Ohio has a legitimate state interest in protecting its business climate and the employment of its citizens by shielding Ohio corporations from hostile tender offers by foreign corporations. Aeronca points to the substantial contribution its operations make to the area of Middletown, Ohio, where its manufacturing plant is located. Aeronca argues that plaintiff's last acquisition resulted in the closing of the United States operations of the target company, implying that if plaintiff succeeds in its tender offer the Ohio plant may be closed. This argument can be easily dismissed. It is based upon speculation that any person who acquires twenty percent of the voting stock of an Ohio corporation will probably attempt some action harmful to Ohio's business climate, including, in the context of Aeronca's argument, the closing of an Ohio plant with resulting loss of employment by Ohio residents. There is nothing before the Court that would permit a finding to be made that such a result is likely to occur. Furthermore, any legislative attempt by Ohio to control or restrict the ownership of stock of a corporation by

regulating the interstate sale of that stock in order to prevent a new owner from closing an Ohio plant or transferring assets elsewhere would clearly be an unconstitutional interference with interstate commerce. The Court notes, too, that the OCSAA does not attempt to place any restrictions upon Aeronca's current management in terms of its ability to move its Ohio plant elsewhere, perhaps to North Carolina where Aeronca's principal executive offices are located, or to simply close its Ohio plant.

In sum, the local interests asserted by the defendants to support section 1701.831 do not outweigh the substantial burden imposed on interstate commerce by the statute; accordingly, under the analysis of *Bruce Church,* section 1707.831 [*sic*] is an unconstitutional exercise of state legislative power.

XI. CONCLUSION

Having determined that plaintiff has sustained its burden of establishing a substantial likelihood of success on the merits in showing that the Ohio Act is unconstitutional, it is the further opinion of this Court that it has established the remaining three prerequisites for the issuance of a preliminary injunction. "In the context of a tender offer, time is of the essence . . ." *Martin-Marietta Corp.,* 690 F.2d at 568, and subjecting plaintiff Fleet to the unconstitutional requirement of the OCSAA with its inherent ability to delay, amounts to irreparable harm. *Id.* Furthermore, the purported interest of the state in regulating the internal affairs of Ohio corporations and protecting shareholders, many of whom may not even be Ohio residents, cannot be elevated above the objectives of the Williams Act or the constitutional requirement that interstate commerce be not unduly burdened by any state. Nor does defendant Aeronca have any right to the unconstitutional application of state law. *Id.* When balancing the harm to plaintiff if the injunction is denied against the possible harm to be suffered by defendants, the balance is clearly in plaintiff's

favor. Finally, the public interest would also best be served by granting the injunction. "It is in the public interest not to perpetuate the unconstitutional application of a statute." *Id.*

Accordingly, defendant Aeronca's motion for a preliminary injunction is DENIED. Plaintiff Fleet's motion for a preliminary injunction is GRANTED. Defendants are ENJOINED until further order of this Court from taking any action whatsoever to invoke, enforce or apply the provisions of Ohio Rev. Code § 1701.831 against plaintiff in connection with plaintiff's tender offer for shares of common stock of defendant Aeronca.

The security previously given by plaintiff for the issuance of the temporary restraining order shall remain as the security for the issuance of this preliminary injunction.

Entered June 11, 1986

(s) Holschuh, District Judge

FOOTNOTES

1. Kreider, Fortress Without Foundation? Ohio Takeover Act II, 52 Cin. L. Rev. 108, 108 (1983).

2. On June 9, 1986 the Court received a motion of the Ohio Manufacturers Association for leave to file an attached memorandum amicus curiae. The motion is granted and the argument raised in that brief has been considered by the Court.

3. Ohio Rev. Code § 1707.042 [Prohibitions relating to control bids.]

   (A) No person who makes or opposes a control bid to offerees in this state shall knowingly do any of the following:

      (1) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

      (2) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any such offeree;

      (3) Engage in any manipulative act or practice.

   (B) Any person who makes or opposes a control bid to offerees in this state shall be conclusively presumed to have designated the secretary of state as its agent for the service of process in any action or proceeding under Chapter 1707. of the Revised Code. Upon receipt of any such process, together with an affidavit showing the last known address of the person who made or opposed the control bid, the secretary of state shall forthwith give notice by

telegraph of the fact of the service of process and forward a copy of such process to such address by certified mail, with a request for return receipt. This section does not affect any right to serve process in any other manner permitted by law.

(C) Any person who makes or opposes a control bid is subject to the liabilities and penalties applicable to a seller, and an offeree is entitled to the remedies applicable to a purchaser, as set forth in section 1707.41 to 1707.45 of the Revised Code.

(D) In case any provision or application of any provision of this section is for any reason held to be illegal or invalid, such illegality or invalidity shall not affect any legal and valid provision or application of this section.

4. Ohio Rev. Code 1707.042 was enacted at the same time as the Ohio Control Share Acquisition Act but was included in the statutes dealing with regulation of securities transactions and immediately follows Ohio Rev. Code 1707.041, the Ohio Takeover Act. Ohio Rev. Code 1701.831, the Ohio Control Share Acquisition Act, was included in the statutes dealing with regulation of Ohio corporations, consistent with the argument that such legislation is meant to regulate the internal affairs of Ohio corporations.

5. Ohio Rev. Code § 1707.23(E). Enforcement powers of division of securities.

Whenever it appears to the division of securities, from its files, upon complaint, or otherwise, that any person has engaged in, is engaged in, or is about to engage in any practice declared to be illegal or prohibited by Chapter 1707. of the Revised Code, or defined as fraudulent in such chapter, or any other deceptive scheme or practice in connection with the sale of securities, or when the

division believes it to be in the best interest of the public and necessary for the protection of investors, the division may:

(E) Initiate criminal proceedings under section 1707.042 [1707.04.2] or 1707.44 of the Revised Code by laying before the prosecuting attorney of the proper county any evidence of criminality which shall come to its knowledge; and in the event of the neglect or refusal of the prosecuting attorney to prosecute such violations, or at the request of the prosecuting attorney, the division shall submit such evidence to the attorney general, who may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before such grand juries.

6. Ohio Rev. Code § 1707.23(H). Enforcement powers of division of securities.

Whenever it appears to the division of securities, from its files, upon complaint, or otherwise, that any person has engaged in, is engaged in, or is about to engage in any practice declared to be illegal or prohibited by Chapter 1707. of the Revised Code, or defined as fraudulent in such chapter, or any other deceptive scheme or practice in connection with the sale of securities, or when the division believes it to be in the best interest of the public and necessary for the protection of investors, the division may:

(H) Issue and cause to be served by certified mail upon all persons affected an order requiring the person or persons to cease and desist from the acts or practices appearing to the division of securities to constitute violations of Chapter 1707. of the Revised Code. The order shall state specifically the section

or sections of Chapter 1707. of the Revised Code that appear to the division of securities to have been violated and the facts constituting the violation. If after the issuance of the order it appears to the division of securities that any person or persons affected by the order have engaged in any act or practice from which the person or persons shall have been required, by the order, to cease and desist, the director of commerce may apply to the court of common pleas of any county for, and upon proof of the validity of the order of the division of securities, the delivery of the order to the person or persons affected, and of the order to the person or persons affected, and of the illegality and the continuation of the acts or practices that are the subject of the order, the court may grant an injunction implementing the order of the division of securities.

7. In contrast, plaintiff is presently in violation of the requirements of the Ohio Control Share Acquisition Act by failing to deliver to defendant Aeronca an "acquiring person statement," and plaintiff's tender offer states that it is being made without compliance by plaintiff with certain takeover statutes, including the Ohio Control Share Acquisition Act and the Ohio Takeover Act.

8. The defendants' reliance on *CEIC Holding Co. v. Cincinnati Equitable Insurance Co.*, Case No. C-1-84-1587 (S.D. Ohio, W. Div. Nov. 8, 1984) in support of their claim that plaintiff has failed to establish irreparable harm or likelihood of success on the merits does not alter this Court's conclusion.

In *CEIC* plaintiff, contemporaneous with its commencement of a tender offer, filed suit in the Western Division of the Southern District of Ohio seeking a declaration that O.R.C. §§ 1707.041 and 1701.831 were unconstitutional under the Commerce Clause and Supremacy Clause of the United States Constitution and seeking an injunction

to enjoin the state of Ohio and target company from enforcing these Ohio statutes. The court granted plaintiff's motion for a temporary restraining order in regard to the timing provision of O.R.C. § 1707.041. It denied plaintiff's motion in all other respects, finding that plaintiff had failed to establish irreparable harm or a substantial likelihood of success on the merits.

In *CEIC* the target company was an Ohio based corporation with ninety percent (90%) of its outstanding shares held by Ohio residents. The plaintiff was also an Ohio based corporation. Judge Speigel relied heavily upon this fact in deciding plaintiff had failed to show that the indirect burden of the Ohio statute outweighed its local benefits. *Id.* at p. 10. The Court further found that it "did not perceive a serious conflict with federal statutes or regulations warranting injunctive relief at this time." *Id.* at p. 11.

In the present case, this Court has conducted an evidentiary hearing on the plaintiff's motion for preliminary injunction, has received exhaustive briefs from all parties and has the added benefit of relevant case law decided since Judge Speigel denied, in part, the motion for a temporary restraining order in the *CEIC Holding Co.* case. Aside from marked factual differences in the two cases, the Court does not believe that the denial, in part, of a temporary restraining order by another Judge of this Court, constitutes controlling precedent with regard to the constitutional issues presented in this case by plaintiff's motion for preliminary injunction.

9. Ohio Rev. Code § 1701.831 [Procedure for control share acquisitions.]

   (A) Unless the articles or the regulations of the issuing public corporation provide that this section does not apply to control share acquisitions of shares of such corporation, any control share acquisition of an

issuing public corporation shall be made only with the prior authorization of the shareholders of such corporation in accordance with this section.

(B) Any person who proposes to make a control share acquisition shall deliver an acquiring person statement to the issuing public corporation at the issuing public corporation's principal executive offices. Such acquiring person statement shall set forth all of the following:

(1) The identity of the acquiring person;

(2) A statement that the acquiring person statement is given pursuant to this section;

(3) The number of shares of the issuing public corporation owned, directly or indirectly, by the acquiring person;

(4) The range of voting power, described in division (Z)(1)(a), (b), or (c) of section 1701.01 of the Revised Code, under which the proposed control share acquisition would, if consummated, fall;

(5) A description in reasonable detail of the terms of the proposed control share acquisition;

(6) Representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.

(C) Within ten days after receipt of an acquiring person statement that complies with division (B) of this

section, the directors of the issuing public corporation shall call a special meeting of shareholders of the issuing public corporation for the purpose of voting on the proposed control share acquisition. Unless the acquiring person agrees in writing to another date, such special meeting of shareholders shall be held within fifty days after receipt by the issuing public corporation of the acquiring person statement. If the acquiring person so requests in writing at the time of delivery of the acquiring person statement, such special meeting shall not be held sooner than thirty days after receipt by the issuing public corporation of the acquiring person statement. Such special meeting of shareholders shall not be held later than any other special meeting of shareholders that is called, after receipt by the issuing public corporation of the acquiring person statement, in compliance with section 1701.76, 1701.78, 1701.79, 1701.83, or 1701.831 [1701.83.1] of the Revised Code.

(D) Notice of the special meeting of shareholders shall be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for such meeting, whether or not entitled to vote thereat. Such notice shall include or be accompanied by both of the following:

(1) A Copy of the acquiring person statement delivered to the issuing public corporation pursuant to this section;

(2) A statement by the issuing public corporation, authorized by its directors, of its position or recommendation, or that it is taking no position or making no recommendation, with respect to the proposed control share acquisition.

(E) The acquiring person may make the proposed control share acquisition if both of the following occur:

(1) The shareholders of the issuing public corporation who hold shares of such corporation entitling them to vote in the election of directors authorize such acquisition at the special meeting held for that purpose at which a quorum is present by an affirmative vote of a majority of the voting power of such corporation in the election of directors represented at such meeting in person or by proxy, and a majority of the portion of such voting power excluding the voting power of interested shares. A quorum shall be deemed to be present at such special meeting if at least a majority of the voting power of the issuing public corporation in the election of directors, and a majority of the portion of such voting power excluding the voting power of interested shares is represented at such meeting in person or by proxy.

(2) Such acquisition is consummated, in accordance with the terms so authorized, not later than three hundred sixty days following shareholder authorization of the control share acquisition.

[F](G) Except as expressly provided in this section, nothing in this section shall be construed to affect or impair any right, remedy, obligation, duty, power, or authority of any acquiring person, any issuing public corporation, the directors of any acquiring person or issuing public corporation, or any other person under the laws of this or any other state or of the United States.

10. Ohio Rev. Code § 1701.01(Y). Definitions.

As used in sections 1701.01 to 1701.98 of the Revised Code, unless the context otherwise requires:

(Y) "Issuing public corporation" means a domestic corporation with fifty or more shareholders that has its principal place of business, principal executive offices, or substantial assets within this state, and as to which no valid close corporation agreement exists under division (H) of section 1701.591 [1701.59.1] of the Revised Code.

11. Ohio Rev. Code § 1701.832 [Purpose and effect of Am. Sub. H.B. 822.]

(A) In amending section 1701.01, 1701.11, 1701.37, 1701.48, 1707.01, 1707.23, 1707.26, 1707.29, and 1707.99 and in enacting sections 1701.831 [1701.83.1] and 1707.042 [1707.04.2] of the Revised Code, the General Assembly finds:

(1) Existing Ohio corporate law was designed to deal with traditional methods of transfer of control of Ohio corporations. The tender offer has evolved as an alternative device to acquire control of a public corporation that has been in widespread use in the past several decades. The acquisition of significant blocks of the securities of a public company in the open market or private transactions in connection with actual or apparent efforts to acquire control has become more common in recent years and has further complicated the impact of tender offers upon a corporation and its shareholders. Numerous Ohio corporations have been the subject of tender offers and accumulations of significant blocks of securities.

(2) The accumulation of a large block of a corporation's voting shares, or other securities convertible into voting shares, through direct or indirect acquisition from one or more existing shareholders of such corporation has not been subject to the normal corporate approval mechanisms involved in other typical types of acquisition transactions such as mergers, consolidations, combinations and majority share acquisitions. Such accumulations, however, can result in shifts of effective corporate control and hence, from a business and financial perspective, directly or indirectly, can result in significant changes in a variety of basic corporate circumstances identical or substantially similar to those arising as a result of the above-mentioned transactions. For instance, a change in corporate control accompanying a large accumulation of shares will very often result in a fundamental change in the ongoing business of the corporation and a concomitant fundamental change in the nature of the shareholders' investment in it. Thus the potential that such changes in corporate circumstances will occur gives rise to basic issues concerning the internal affairs of the corporation typical of those arising in mergers, consolidations, combinations and majority share acquisitions. The form of the transaction in which such issues arise should not alter the basic corporate mechanisms by which such issues are presented and resolved.

(3) Tender offers almost always involve a change in corporate control and, therefore, give rise to these same basic issues concerning internal corporate affairs. Although tender offers in theory offer shareholders the opportunity to consider such issues in deciding whether or not to tender their shares, in practice they do

not. Tender offers are coercive in the sense that shareholders are normally concerned that a majority of their fellow shareholders will tender their shares, leaving them in a minority position with one controlling shareholder. Thus, shareholders often feel compelled to tender their shares, regardless of how they feel about the corporate control issues inherent in any tender offer. The opportunity for reasoned decision-making is further hindered by the short time periods in which tender offers can be consummated, the structures of many recent tender offers, which are designed to encourage prompt tenders, and the fact that individual shareholders typically receive or obtain tender offer materials much later than institutional shareholders.

(4) It is in the public interest for shareholders to have a reasonable opportunity to express their views by voting on a proposed shift of control, an opportunity currently available under Ohio corporation law in transactions with similar effects. The General Assembly also believes that it is in the public interest for Ohio securities laws to provide evenhanded protection of offerors and shareholders from fraudulent and manipulative transactions arising in connection [with] control acquisitions.

(5) Initial state efforts to deal with tender offer developments have been questioned by the federal courts. The General Assembly observes that responsibility for general corporate laws is the function of state legislation and that no federal law of corporations exist. The General Assembly observes that securities law protection of state residents has long been recognized as an appropriate subject of state law regulation under the federal system. The

General Assembly acknowledges an in loco parentis responsibility to shareholders who invest in corporations created under the laws of Ohio and to shareholders generally who reside in Ohio.

(B) Section 1701.01, 1701.11, 1701.37, 1701.48, 1707.01, 1707.23, 1707.26, 1707.29, and 1707.99, as amended by this act, and section 1701.831 [1701.83.1] and 1707.042 [1707.04.2], as enacted by this act, are a recognition of the state's responsibility with respect to the subject matter of the act. Nevertheless, with a view to avoiding an undue burden on interstate commerce, as expressed in recent court decisions, the amendments are designed to have the minimum impact upon such commerce consistent with Ohio responsibility in respect to the subject matter. Accordingly, the security law in sections 1707.23, 1707.26, 1707.29 and 1707.99 and in newly enacted section 1707.042 [1707.04.2] of the Revised Code are limited to application to Ohio resident investors, and the corporate law amendments in sections 1701.11, 1701.37, and 1701.48 and in newly enacted section 1701.831 [1701.83.1] of the Revised Code are limited to corporations created under the laws of Ohio with the strong Ohio ties provided in the amendments. The corporate legislation does not include a requirement for Ohio resident investors because of the difficulty of ascertainment by potential acquirers and others of the residence of shareholders. The General Assembly finds that corporations containing the jurisdictional nexus provided by the amendments may be deemed to have a substantial and significant shareholder base in the state.

12. Ohio Rev. Code § 1701.832 recites, among other things, that "initial state efforts to deal with tender offer developments have been questioned by the federal courts," an

obvious reference to the Supreme Court's decision in the *MITE* case. The "internal affairs" argument, however, in the context of such statutes placing an impermissible burden on interstate commerce, was rejected by the Supreme Court in *MITE,* has been rejected by other courts in relation to statutes similar to Ohio's Control Share Acquisition Act and, as noted later in this opinion, is rejected by this Court as well.

13. Ohio Rev. Code § 1701.01(Z)(1). Definitions.

As used in section 1701.01 to 1701.98 of the Revised Code, unless the contest otherwise requires:

(Z)(1) "Control share acquisition" means the acquisition, directly or indirectly, by any person, of shares of an issuing public corporation that, when added to all other shares of the issuing public corporation in respect of which such person may exercise or direct the exercise of voting power as provided in this division, would entitle such person, immediately after such acquisition, directly or indirectly, alone or with others, to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of such voting power:

(a) One-fifth or more but less than one-third of such voting power;

(b) One-third or more but less than a majority of such voting power;

(c) A majority or more of such voting power.

A bank, broker, nominee, trustee, or other person, however, who acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose

of circumventing section 1701.831 [1701.83.1] of the Revised Code shall be deemed to have voting power only of shares in respect of which such person would be able to exercise or direct the exercise of votes without further instruction from others at a meeting of shareholders called under section 1701.831 [1701.83.1] of the Revised Code.

14. Ohio Rev. Code § 1701.01(Z)(2). Definitions.

As used in sections 1701.01 to 1701.98 of the Revised Code, unless the context otherwise requires:

(Z)(2) The acquisition of any shares of any issuing public corporation does not constitute a control share acquisition for the purpose of section 1701.831 [1701.83.1] of the Revised Code if the acquisition is consummated in any of the following circumstances:

(a) Prior to November 19, 1982;

(b) Pursuant to a contract existing prior to November 19, 1982;

(c) Pursuant to the laws of descent and distribution;

(d) Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing section 1701.831 [1701.83.1] of the Revised Code;

(e) Pursuant to a merger or consolidation effected in compliance with section 1701.78 or 1701.79 of the Revised Code if the issuing

public corporation is a party to the agreement of merger or consolidation.

The acquisition by any person of shares of an issuing public corporation in a manner described under this division shall be deemed to be a control share acquisition authorized pursuant to section 1701.831 [1701.83.1] of the Revised Code within the range of voting power under division (Z)(1)(a), (b), or (c) of this section that such person is entitled to exercise after such acquisition, provided that, in the case of an acquisition in a manner described under division (Z)(2)(c) or (d) of this section, the transferor of shares to such person had previously obtained any authorization of shareholders required under section 1701.831 [1701.83.1] of the Revised Code in connection with such transferor's acquisition of shares of the issuing public corporation.

15. See n. 11, *supra*.

16. At the hearing, counsel for defendant Aeronca conceded this effect:

JUDGE: I'm not referring to completion under the Williams Act in the sixty day period at all. I'm not referring to that. My question was simply as a practical matter the operation of the Ohio law in the event that the management would not approve of the offer would result in a proxy fight for the vote of the shareholders.

MR. HALL: I think I probably couldn't disagree with that, Your Honor. I would say that I think that's probably a good thing. I think that maybe that the Williams Act in its purpose of advising share-

holders and informing them before they are required to take this curb-side offer for their shares ought to be informed of the nature of the transactions, what's being offered and what the alternatives are.

17. The Court notes that the OCSAA also modified O.R.C. § 1701.48 governing voting by proxy at shareholder meetings. Although prior law had permitted the proxy to be irrevocable when coupled with an interest, the amendment now requires proxies in connection with a vote on a control share acquisition to be revocable in all cases. Additionally, the proxies must be solicited in a manner divorced from the actual tender. *See* O.R.C. § 1701.48. This means that the offeror would be required to make two solicitations — one for the tender and one for the authorization of proxies. *See generally* Kreider, *Fortress Without Foundation? Ohio Takeover Act II,* 52 Cin. C. [*sic*] Rev. 108 (1983).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 86-3533 and 86-3536

FLEET AEROSPACE CORPORATION
Plaintiff-Appellee

v.

MARK HOLDERMAN, KENNETH COX,
THE STATE OF OHIO and
AERONCA, INC.
Defendants-Appellants

Appeal From The United States District
Court For The Southern District
of Ohio, Eastern Division

Case No. C-2-86-0556

Judge Holschuh

NOTICE OF APPEAL OF THE STATE OF OHIO, MARK HOLDERMAN, AND KENNETH COX TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Ohio, Mark Holderman, Acting Commissioner of Securities of the State of Ohio, and Kenneth Cox, Director of the Ohio Department of Commerce, hereby appeal to the Supreme Court of the United States from the decision and judgment of this Court filed on June 25, 1986 (the mandate of which was filed on June 30,

1986) holding § 1701.831 of the Ohio Revised Code to be unconstitutional, and enjoining its enforcement. The appeal is taken pursuant to 28 U.S.C. § 1254(2).

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Filed July 7, 1986

APPENDIX D

TEXT OF STATUTES INVOLVED

The Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)

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15 U.S.C. § 78m

(d)(1)Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors —

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchasers have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other

consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to —

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e)(1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to

control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have the power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

Effective July 29, 1968

15 U.S.C. § 78n

(d)(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the

issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing

to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security —

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purpose of this subsection.

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 78m of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

Effective July 29, 1968

The Ohio Control Share Acquisition Act

Ohio Revised Code § 1701.831

CONTROL SHARE ACQUISITIONS; PRIOR SHAREHOLDER AUTHORIZATION REQUIRED; PROCEDURES

(A) Unless the articles or the regulations of the issuing public corporation provide that this section does not apply to control share acquisitions of shares of such corporation, any control share acquisition of an issuing public corporation shall be made only with the prior authorization of the shareholders of such corporation in accordance with this section.

(B) Any person who proposes to make a control share acquisition shall deliver an acquiring person statement to the issuing public corporation at the issuing public corporation's principal executive offices. Such acquiring person statement shall set forth all of the following:

(1) The identity of the acquiring person;

(2) A statement that the acquiring person statement is given pursuant to this section;

(3) The number of shares of the issuing public corporation owned, directly or indirectly, by the acquiring person;

(4) The range of voting power, described in division (Z)(1)(a), (b), or (c) of section 1701.01 of the Revised Code, under which the proposed control share acquisition would, if consummated, fall;

(5) A description in reasonable detail of the terms of the proposed control share acquisition;

(6) Representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.

(C) Within ten days after receipt of an acquiring person statement that complies with division (B) of this section, the directors of the issuing public corporation shall call a special meeting of shareholders of the issuing public corporation for the purpose of voting on the proposed control share acquisition. Unless the acquiring person agrees in writing to another date, such special meeting of shareholders shall be held within fifty days after receipt by the issuing public corporation of the acquiring person statement. If the acquiring person so requests in writing at the time of delivery of the acquiring person statement, such special meeting shall not be held sooner than thirty days after receipt by the issuing public corporation of the acquiring person statement. Such special meeting of shareholders shall not be held later than any other special meeting of shareholders that is called, after receipt by the issuing public corporation of the acquiring person statement, in compliance with section 1701.76, 1701.78, 1701.79, 1701.83, or 1701.831 of the Revised Code.

(D) Notice of the special meeting of shareholders shall be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for such meeting, whether or not entitled to vote thereat. Such notice shall include or be accompanied by both of the following:

(1) A copy of the acquiring person statement delivered to the issuing public corporation pursuant to this section;

(2) A statement by the issuing public corporation, authorized by its directors, of its position or recom-

mendation, or that it is taking no position or making no recommendation, with respect to the proposed control share acquisition.

(E) The acquiring person may make the proposed control share acquisition if both of the following occur:

(1) The shareholders of the issuing public corporation who hold shares of such corporation entitling them to vote in the election of directors authorize such acquisition at the special meeting held for that purpose at which a quorum is present by an affirmative vote of a majority of the voting power of such corporation in the election of directors represented at such meeting in person or by proxy, and a majority of the portion of such voting power excluding the voting power of interested shares. A quorum shall be deemed to be present at such special meeting if at least a majority of the voting power of the issuing public corporation in the election of directors, and a majority of the portion of such voting power excluding the voting power of interested shares is represented at such meeting in person or by proxy.

(2) Such acquisition is consummated, in accordance with the terms so authorized, not later than three hundred sixty days following shareholder authorization of the control share acquisition.

(G) [*sic*] Except as expressly provided in this section, nothing in this section shall be construed to affect or impair any right, remedy, obligation, duty, power, or authority of any acquiring person, any issuing public corporation, the directors of any acquiring person or issuing public corporation, or any other person under the laws of this or any other state of the United States.

Effective November 18, 1982

Ohio Revised Code § 1701.832

LEGISLATIVE FINDINGS AND STATEMENT OF PURPOSES; TENDER OFFERS

(A) In amending sections 1701.01, 1701.11, 1701.37, 1701.48, 1707.01, 1707.23, 1707.26, 1707.29, and 1707.99 and in enacting sections 1701.831 and 1707.042 of the Revised Code, the General Assembly finds:

(1) Existing Ohio corporate law was designed to deal with traditional methods of transfer of control of Ohio corporations. The tender offer has evolved as an alternative device to acquire control of a public corporation that has been in widespread use in the past several decades. The acquisition of significant blocks of the securities of a public company in the open market or private transactions in connection with actual or apparent efforts to acquire control has become more common in recent years and has further complicated the impact of tender offers upon a corporation and its shareholders. Numerous Ohio corporations have been the subject of tender offers and accumulations of significant blocks of securities.

(2) The accumulation of a large block of a corporation's voting shares, or other securities convertible into voting shares, through direct or indirect acquisition from one or more existing shareholders of such corporation has not been subject to the normal corporate approval mechanisms involved in other typical types of acquisition transactions such as mergers, consolidations, combinations and majority share acquisitions. Such accumulations, however, can result in shifts of effective corporate control and hence, from a business and financial perspective,

directly or indirectly, can result in significant changes in a variety of basic corporate circumstances identical or substantially similar to those arising as a result of the above-mentioned transactions. For instance, a change in corporate control accompanying a large accumulation of shares will very often result in a fundamental change in the ongoing business of the corporation and a concomitant fundamental change in the nature of the shareholders' investment in it. Thus the potential that such changes in corporate circumstances will occur gives rise to basic issues concerning the internal affairs of the corporation typical of those arising in mergers, consolidations, combinations and majority share acquisitions. The form of the transaction in which such issues arise should not alter the basic corporate mechanisms by which such issues are presented and resolved.

(3) Tender offers almost always involve a change in corporate control and therefore, give rise to these same basic issues concerning internal corporate affairs. Although tender offers in theory offer shareholders the opportunity to consider such issues in deciding whether or not to tender their shares, in practice they do not. Tender offers are coercive in the sense that shareholders are normally concerned that a majority of their fellow shareholders will tender their shares, leaving them in a minority position with one controlling shareholder. Thus, shareholders often feel compelled to tender their shares, regardless of how they feel about the corporate control issues inherent in any tender offer. The opportunity for reasoned decision-making is further hindered by the short time periods in which tender offers can be consummated, the structures of many recent tender offers, which are designed to encourage prompt tenders, and the fact that individual shareholders typically receive or

obtain tender offer materials much later than institutional shareholders.

(4) It is in the public interest for shareholders to have a reasonable opportunity to express their views by voting on a proposed shift of control, an opportunity currently available under Ohio corporation law in transactions with similar effects. The General Assembly also believes that it is in the public interest for Ohio securities laws to provide even-handed protection of offerors and shareholders from fraudulent and manipulative transactions arising in connection control [with] acquisitions.

(5) Initial state efforts to deal with tender offer developments have been questioned by the federal courts. The General Assembly observes that responsbility [*sic*] for general corporate laws is the function of state legislation and that no federal law of corporations exists. The General Assembly observes that securities law protection of state residents has long been recognized as an appropriate subject of state law regulation under the federal system. The General Assembly acknowledges an in loco parentis responsibility to shareholders who invest in corporations created under the laws of Ohio and to shareholders generally who reside in Ohio.

(B) Sections 1701.01, 1701.11, 1701.37, 1701.48, 1707.01, 1707.23, 1707.26, 1707.29, and 1707.99 as amended by this act, and sections 1701.831 and 1707.042, as enacted by this act, are a recognition of the state's responsibility with respect to the subject matter of the act. Nevertheless, with a view to avoiding an undue burden on interstate commerce, as expressed in recent court decisions, the amendments are designed to have the minimum impact upon such commerce consistent with Ohio responsibility in respect to the subject matter. Accordingly, the security law amendments in sections 1707.23, 1707.26, 1707.29 and 1707.99 and in newly enacted

section 1707.042 of the Revised Code are limited to application to Ohio resident investors, and the corporate law amendments in sections 1701.11, 1701.37, and 1701.48 and in newly enacted section 1701.831 of the Revised Code are limited to corporations created under the laws of Ohio with the strong Ohio ties provided in the amendments. The corporate legislation does not include a requirement for Ohio resident investors because of the difficulty of ascertainment by potential acquirers and others of the residence of shareholders. The General Assembly finds that corporations containing the jurisdictional nexus provided by the amendments may be deemed to have a substantial and significant shareholder base in the state.

Effective November 18, 1982

APPENDIX E

TEXT OF REGULATIONS INVOLVED

SELECTED REGULATIONS PROMULGATED BY THE SECURITIES AND EXCHANGE COMMISSION UNDER THE WILLIAMS ACT (EXCERPTS)

17 C.F.R. § 240.14d-7

ADDITIONAL WITHDRAWAL RIGHTS

(a) *Rights.* In addition to the provisions of section 14(d)(5) of the Act, any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the following periods:

(1) At any time until the expiration of fifteen business days from the date of commencement of such tender offer; . . . .

Effective December 6, 1979

17 C.F.R. § 240.14e-1

UNLAWFUL TENDER OFFER PRACTICES

As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, no person who makes a tender offer shall:

(a) Hold such tender offer open for less than twenty business days from the date such tender offer is first published or sent or given to security holders; . . . .

Effective January 14, 1986